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THE JUDICIAL BULWARK OF THE CONSTITUTION

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Few peculiarly American political devices have so perennial an interest, it seems, as our guardianship of the Constitution through the power of the judiciary. How unusually strong that interest is to day is well attested by the numerous examinations, chiefly within the past two years, of the sanctions for this much debated function. Especially significant is it, however, considering all that a long succession of legalists, historians, and political scientists have written upon the origin of judicial control, that so much fresh matter can be added to the elucidation of this problem.[1] Yet it must be admitted that real contributions to various aspects of the topic may be found in the recent studies by Prof. A. C. McLaughlin, Prof. E. S. Corwin, Prof. C. A. Beard, Dr. C. G. Haines, and Mr. H. P. Dougherty, not forgetting also

[1] Such, for example, as: Story, *Commentaries on the Constitution;* George Bancroft, *History of the Formation of the Constitution of the United States* (1889) (1882); H. W. Rogers (editor), *Constitutional History as seen in American Law,* New York (1890); Brinton Coxe, *Judicial Power* (1893); W. M. Meigs, *Growth of the Constitution* (1910); G. B. Elliot, The Legislature and the Constitution, 5; *Political Science Quarterly,* 224; J. B. Thayer, *Legal Essays;* S. E. Baldwin, *The American Judiciary* (1904); W. W. Willoughby, *American Constitutional System* (1904), etc.

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such late articles as those by Mr. Hampton L. Carson, Mr. C. H. Burr, Mr. Herbert Pope, Mr. W. M. Meigs and others.[2]

Perhaps the most stimulating result of any attempt to correlate these separate contributions, is the conviction that there are still gleanings left in the field. Such a stimulus accounts for the present paper whose primary object is a reëxamination of the most probable date for the establishment of the doctrine of judicial supervision—and abrogation—of unconstitutional legislation.

History and legend, alike, having done so much to make it proverbial that the power of the Supreme Court over acts of Congress builds upon Chief Justice Marshall's potent decision in Marbury vs. Madison, it is but natural to start our investigation from the same epochal date. For if all practice since February 1803 bases itself upon the dictum of John Marshall we may well inquire, upon what Marshall's pronouncement was founded.[3]

[2] A. C. McLaughlin, *The Courts, the Constitution and Parties*, Chicago, (1912); E. S. Corwin, The Rise of Judicial Review, 9 *Michigan Law Review*, 102–128, 283–316 (also 4 *Michigan Law Review*, 616); E. S. Corwin, *National Supremacy*, New York, (1913); C. A. Beard, *The Supreme Court and the Constitution*, New York (1912); H. P. Dougherty, *Power of the Federal Judiciary over Legislation*, New York, (1912); C. D. Haines, The Conflict over Judicial Powers in the United States to 1820, *Columbia University Studies*, vol. 35, No. 1; H. L. Carson, The Historic Relation of Judicial Power to the Constitution, 60 *University of Pennsylvania Law Review*, 687, ff.; C. H. Burr, Unconstitutional Law and the Federal Judicial Power, 60 *University of Pennsylvania Law Review*, 624 ff. (1912); H. Pope, The Fundamental Law and the Courts, 27 *Harvard Law Review*, 45–67, November (1913); W. M. Meigs, The American Doctrine of Judicial Power, and its Early Origin, 47 *American Law Review*, 691 September-October (1913) (largely restates views presented in earlier numbers of the same Review); Robert P. Reeder, Constitutional and Extra Constitutional Restraints, 61 *University of Pennsylvania Law Review*, 441, ff., May (1913) (bibliography good); J. B. McDonough, Usurpation of Power by Federal Courts, 46 *American Law Review*, 45 ff. (superficial); W. F. Dodd (review of Beard's Supreme Court and Constitution and Dougherty's Power of Federal Judiciary) 18 *American Historical Review*, 380, January (1913); Horace A. Davis, Annulment of Legislation by the Supreme Court, 7 *American Political Science Review*, 541–587, November (1913) (possibly the strongest presentation, based on historical research, of the argument against judicial control); G. E. Roe, Our Judicial Oligarchy, New York (1912) (very superficial); Max Farrand, *The Framing of the Constitution of the United States*, New Haven (1913) (very slight reference, but reviewed on this score by Dodd, 19 *American Historical Review*, 402, and Latané, 7 *American Political Science Review*, 697); F. N. Judson. The Judiciary and the People, New Haven (1913) (series of lectures—suggestive.)

[3] 1 Cranch, 137–179.

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It is hardly necessary to pause over the often repeated incidents of the case of Marbury vs. Madison. It is the familiar story of the organization of the District of Columbia late in February, 1801, which necessitated President Adams' eleventh-hour appointments of justices of the peace there, with the result that certain of the fully completed commissions had not yet been sent out, when Jefferson became president and forbade their delivery, hence the effort of Marbury and others of these appointees to secure their offices by a writ of *mandamus* from the Supreme Court to Madison, who had followed Marshall as secretary of state. Likewise we recall the court's denial of the writ when Marshall declared that though the right was clear, and the mandamus a proper remedy, yet the court was powerless to grant it since the judiciary act under which the suit was brought could not constitutionally grant this original jurisdiction to the Supreme Court.

An analysis of the court's decision shows six bases upon which it assumes to rest. (1) The nature of the facts in the case, (2) legislative antecedents, (3) judicial precedents, (4) established sanction, (5) constitutional authority, and (6) rational interpretations. It is significant to note that these bases, of Marshall's decision, correspond most strikingly, though in reverse order, with the similar distinct steps which are traceable in the growth of the judicial power in the history of the government prior to 1803, viz., (1) its origin, (2) adoption, (3) validation, (4) usage, (5) ratification, and (6) confirmation. In short Marshall was thus unconsciously *retracing* the evolution of the fundamental authority of his decision, as we may find in tracing the *natural* course of this evolution.

The potency of the logic of the opinion in Marbury vs. Madison lies essentially in its recognition of "certain principles supposed to have been long and well established."[4] These briefly are, as Marshall indicates: the people in their capactiy of national sovereign, establishing certain basic ideas of government of a necessarily permanent character, expressed in a written constitution,

[4] 1 Cranch, 175.

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for a governmental organization of separated powers having prescribed limits. From this the corollary is clear. "The Constitution is either a superior paramount law unchangeable by ordinary means; or it is on a level with ordinary legislative acts and like other acts is alterable when the legislature shall please to alter it. If the former part of the alternative be true then a legislative act contrary to the Constitution is not law; if the latter part is true, then written constitutions are absurd attempts on the part of the people to limit a power in its power illimitable." The solution of this irresistible alternative is to be sought in the judicial power for "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule." Moreover they must resolve the question of precedence where laws conflict. Hence, the conclusion comes, that "it is essential to all written constitutions that a law repugnant to the Constitution is void; and that courts as well as other departments are bound by that instrument."

Thus Marshall crystallized concisely and pregnantly the pet ideas of his day as indicated by such great congressional debates as those of 1789, of 1796 and particularly of 1802, touching the sovereign people, the paramount Constitution, the limited government, a system of checks and balances, and the bulwark of an independent judiciary.

How truthfully, moreover, Marshall spoke of the long established sanction of these prevalent principles is most strikingly confirmed by the investigations of Professor McLaughlin, Professor Corwin and others. The former has shown particularly what were the dominant ideas of the men of the Revolution and whence these came. A summary of his effective analysis of this atmosphere of political theories shows some five leading concepts which affected the position of the judiciary.[5] The first is the idea of the separation of powers and the independency of the judiciary, hence the courts believe they are not bound by decisions of a collateral branch in interpreting the Constitution. Second, is

[5] McLaughlin, *The Courts, the Constitution and Parties*, pp. 105–107.

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the prevalent deep conviction of a need to limit government to insure personal rights. Third, there is a notion of a fundamental law in all free states, which must be maintained to protect personal rights. Fourth, is a belief strong among the young lawyers of the Revolution of the existence of natural rights paramount to all government. Lastly is noted a belief, confirmed by Coke, that English courts might hold an act of parliament contrary to natural rights as thereby null and void. Also Professor McLaughlin emphasizes the fact that the break of colonial with English constitutional growth comes at a time when English courts are still independent and influential, and parliament itself a legal tribunal.[6]

Elsewhere Professor McLaughlin emphasizes the importance of the fact that the Constitution declares itself to be law and hence enforceable in the courts.[7] Seizing this idea, to which as expressed by Professor McLaughlin exception has been taken, Mr. Pope, in his article "The Fundamental Law and the Power of the Courts," has very suggestively developed the significance of the position of the courts in a government of distinctly separated powers, holding that while the legislature can express a constitutional *opinion*, *only the courts* can declare what is law, and can expound the Constitution as law. A chief fault of his argument, however, seems to be a failure to grasp the significance of the location of the *sovereignty behind* every fundamental law.[8]

Professor Corwin also has given a concise exposition of the development of theories touching the judiciary in the United States.[9] In this connection he has contributed effective evidence of the significant direct influence upon "the Fathers" of statements by Coke and Blacksone as to the power of English courts to declare the nullity of a statute contravening natural right and reason. Most pertinent, however, for our inquiry, is the evidence afforded by Professor Corwin's recent careful analysis of the constitutional theories expressed in the federal convention, especially

[6] Ibid, 194–99.
[7] Ibid, 245–91.
[8] 27 *Harvard Law Review*, 45–67.
[9] 4 *Michigan Law Review*, 616; 9 *Michigan Law Review*, 102, 283.

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upon the question of the *inherent nature of* a coördinate independent judiciary.[10] From the dominance of this theory and the definitions thereof given in the convention the conclusion is reached that the framers clearly understood the doctrine of judicial control to be a characteristic of the Constitution.

The question of the actual attitude taken by the federal convention upon the subject of judicial abrogation is, indeed, a vital one for probably few statements in Marshall's decision have been so strenuously disputed as the assertions that the construction set forth therein was explicitly supported by "the peculiar expressions of the Constitution of the United States." He cited in proof the extension of the judicial power of the United States to all cases arising under the Constitution; the need of a bulwark to assure the enforcement of the constitutional guarantees and prohibitions in behalf of personal rights, against legislative infringement; and, also, the special oath binding the judiciary to act agreeably to the Constitution. These Marshall declared were but selected evidences "that the framers of the Constitution contemplated that instrument as a rule for the government of the courts."[11]

Critics however have strongly asserted that Marshall's conclusions are pure inferences since the Constitution itself nowhere explicitly states that acts of Congress violating its provisions may be disregarded by the courts. It thus becomes an important question whether the framers intended that this should be implicit in the instrument they had prepared. For evidences of such intentions *Elliot's Debates* have long been scrutinized, but since the appearance of Professor Farrand's indispensable *Records of the Federal Convention* it has been needful to resurvey the subject. Among such new studies are the recent brochures by Professor Beard and Mr. Dougherty.[12] Mr. Dougherty contributes somewhat in the way of emphasis and reorganization of the story of the growth of the supreme law, and judicial clauses in the Consti-

[10] In a forthcoming article the manuscript of which Professor Corwin has very kindly afforded me the privilege of reading and citing—nor has Professor Corwin, in this analysis, by any means exhausted the instances of expressed opinions in the convention.

[11] 1 Cranch, p. 178; cf. for criticisms, Coxe, *Judicial Power*, etc., pp. 54–67.

[12] Cited, p. 1, above.

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tution. More significant, however, is Professor Beard's poll of the personal attitude of members of the convention as shown by their utterances or practice about 1787. Neither study, however, has exhausted the evidence upon the convention.

To understand clearly the principles of judicial power as developed by the convention of 1787 one must keep ever in view that fundamental query which shows itself in some guise through every phase of the proceedings; to wit, how should this new instrument of government receive from its formulation a peculiar sanction as paramount law to which all other legislation must yield without parley or use of force. The necessity of some especial guarantee for national law was impressed upon every delegate by the disgraceful provincial disregard of federal treaty obligations. But such a necessity was also predicated by state experiments aiming to give security to their constitutions by such devices as official oaths (New Jersey), executive veto rights (Massachusetts, etc.) a council of revision (New York), or of censors (Pennsylvania), and a growing general tendency toward judicial disregard of unconstitutional legislation.[13]

Why the practice of judicial abrogation, of all these devices, should have become the preëminent bulwark of the Constitution, is probably as explicable as the corresponding disregard of national plighted faith which chiefly brought its exercise. How pertinent this issue was in the summer of 1787 is most strikingly illustrated by a circular letter sent forth to the States, from the Congress at New York, almost on the eve of the assembling of the convention at Philadelphia.

This circular of April 13, was drafted by the secretary of foreign affairs in accordance with resolutions unanimously adopted by Congress on March 20, in votes of both of these days all States in the Union except New Hampshire being represented.[14] The letter was the outgrowth of protests made by the British government regarding American violations of the treaty of 1783, and it strongly admonished that every State should pass a general act

[13] Cf. W. F. Dodd, *Revision of State Constitutions*, pp. 30-39.

[14] *Journals of Congress*, 1878, p. 32 ff. It is interesting to note that Rhode Island was represented by Varnum of Trevett vs. Weeden fame.

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declaring the abrogation of all laws repugnant to the treaty obligations of the confederation.

"Our national Constitution having committed to us the management of the national concerns with foreign states and powers," declared Congress, "it is our duty to take care that . . . . . the faith of treaties remain inviolate. . . . When therefore a treaty is constitutionally made, ratified and published by us it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention of State legislatures."[15] After explaining fully the desired general repeal by description, rather than enumeration, and with a clause enjoining the courts to declare the nullity of all legislation contrary to the treaty stipulations, Congress explained that thus, "by repealing in general terms all acts and clauses repugnant to the treaty, the business will be turned over to its proper department, viz., the judicial; and the courts of law will find no difficulty in deciding whether any particular act is, or is not contrary to the treaty."[16]

Prompted by such admonition is it surprising that Massachusetts and other States immediately passed the prescribed repealing act and that in several States the courts began "to take hold of" repugnant acts of the legislatures?[17] Sent forth thus upon the very eve of the meeting of the Philadelphia convention could this circular letter have failed of a deep impression upon the minds of its members, some six of whom had, indeed, as members of Congress, voted for the issuance of this letter.[18] And, yet more, in the face of so close an approximation of the idea of a supreme law of the land under judicial guardianship, what possible wonder is there that the convention most carefully considered the function of judicial supervision of legislation under the new Constitution which they were framing.

[15] *Journal of Congress*, p. 32.

[16] Ibid, p. 36.

[17] Massachusetts passed a repealing law April 20, Cf. Goodell 7, *Harvard Law Review*, 415. For the action of other States see Corwin, *National Supremacy*, *ch. iii.*

[18] These were King, Johnson, Madison, Blount, Few and Pierce.

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How potently under such stimuli the problem of a paramount sanction influenced the character of the federal "frame of government" can be traced particularly in the persistent appearances of two proposed solutions of the difficulty; the one a council of revision for national legislation, the other a mode of congressional abrogation of objectionable state measures. The result was the adoption of the supreme law clause, the definition of the scope of judicial cases, the qualified executive veto, and the requirement of special oaths from all members of government to observe and support the Constitution. The connection of these results with the exposition of judicial power can be seen from a review of the course of action touching the proposed protective expedients.

Of the dates of the federal convention especially pertinent to the recognition of the abrogative function of the judicial power some twenty deserve our notice. While these vary in relative importance, yet each instance contributed to the chain of occasions whose number and natural sequence should indicate how much larger a part the matter of judicial control played in the convention than is usually supposed, and how much more significant in its coherent evolution was the ultimate result achieved.[19]

It was natural in view of the imperative need of State restraints that so early as May 29 and 31, by Madison's account, the idea of revision of the acts of state government by Congress should have been accepted without dissent.[20] And particularly pertinent was it that Franklin should have brought about the explicit inclusion of treaties in the rudimentary supreme law clause.[21] By this development of the ideas of the circular of April 13, all

[19] These dates were May 29, and 31, June 8, 11, 15, 16 and 18, July 17 and 23 and August 23, chiefly touching some mode of nullifying repugnant state laws; June 4, and 6, July 21 and August 15 upon the proposition of a council of revision for acts of Congress, and also July 18, August 22, 23 and 27, and September 12 and 14 significant for the combination of the lines of development underlying these two movements. It is believed that the accumulative force of this evidence will warrant our foregoing in this paper the more interesting method, almost invariably followed, of presenting characteristic quotations from the six, eight, or at most striking *debates* upon judicial control.

[20] Farrand: *Records of the Federal Convention*, i, p. 21; i, p. 59–60.

[21] Ibid, i, 54, 61.

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State laws contravening the Articles of Union and treaties of the United States were to be negatived by the national legislature.

A few days later, on June 4, a resolution of the "Virginia plan" touched the growing apprehension of danger from the legislative power, and caused a motion by Wilson and Madison, providing that the national legislature should be checked by a joint executive—judiciary council of revision.[22] But after debate the scheme was tabled on the motion of Gerry and King, both of Massachusetts, who urged that in any case the judiciary would have the function of nullifying unconstitutional laws.[23] The vote to table stood 64, but Butler's and Gerry's substitute motion to vest the *immediate* revisionary functions in a qualified veto carried by an 8 to 2 majority.[24] Among the other members participating in, or attending this debate were Franklin, Wilson, Bedford, Pierce, McClurg and Yates. Two days later another debate on the tabled proposition brought protests from Pinckney and Dickinson, against the inclusion of the judges in the council of revision, Dickinson objecting that it was an improper mixture of governmental powers and contrary to judicial independence. The delegations of Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina and Georgia against those of Connecticut, New York and Virginia voted to exclude judges from a council of revision.[25]

Two days after his opposition to including judges in the revisionary council (June 8), Charles Pinckney was responsible for reopening the question of the Congressional veto upon state laws. He asserted that the adoption of the new government would *ipso facto* abrogate all state laws and constitutions in conflict therewith.[26] While a debate of June 11, brought from Williamson of North Carolina the declaration that "the union will become the *law of the land*," apparently the first use in the convention of

[22] Farrand, i, 94, 97, 114. The debate is reported by Madison, Yates, King, Pierce and Mason.

[23] The idea of the council of revision (Madison said on August 14) was borrowed from New York. Cf. Farrand, ii, 291.

[24] Connecticut and Maryland opposed it.

[25] Ibid, i, 139.

[26] Ibid, i, 164, 170.

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the phrase here italicized.[27] Then the New Jersey plan on June 15, offered as its sixth article a supreme law proviso intended to solve the problem of controlling state acts.[28] Although during the next day's debate on the measure Lansing of New York declared that the States would allow no sort of national negative on their laws,[29] nevertheless, on June 18, Hamilton his colleague, offered a "plan" which contained a provision that State laws contrary to the Constitution, etc., should be void.[30]

After remaining for a time in abeyance the matter of special safeguards against objectionable legislation was revived on July 17. The question of the Congressional veto on repugnant state laws being again under debate it was urged, especially by Madison, Sherman, and Gouverneur Morris, that such was the function of the courts which would abrogate unconstitutional laws.[31] Therefore on the motion of Luther Martin there was substituted a statement essentially that of the supreme law provision of the New Jersey plan of June 13, thus specifically recognizing that the judicial power offered the proper solution of the problem.[32] The spirit of the action was also reflected by McClurg in a later debate of the day when he urged as equally essential that the independence of the executive and of the judiciary be protected.[33]

As a consequence of the action of July 17, Randolph's draft of a compromise proposal intended to conciliate the small states was eliminated, this proposal having been that if congressional revision were adopted there might be an appeal by the States from specific cases of such a veto to the national judiciary who should declare the congressional negative void if it should appear to be contrary to the Constitution.[34] Instéad of such a compromise, however, on July 18, the action of the previous day was strengthened by the unanimous adoption of a broader measure,

[27] Ibid, i, 207.
[28] Ibid, i, 245.
[29] Ibid, i, 250.
[30] Ibid, i, 293.
[31] Ibid, ii, 27, 28.
[32] Cf. Ibid, iii, 273.
[33] Ibid, ii, 33. Cf. Also 26 and 34.
[34] Ibid, iii, 56, drawn up on July 10—mentioned on July 16. Cf. Ibid, ii, 17.

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viz., a rudimentary judicial jurisdiction clause, sponsored by Madison.[35] This resolution stated "that the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature and to such other questions as involve the National peace and harmony."

This recognition of the sphere of the courts, moreover, proved a potent influence when on July 21, the *national* aspect of the control of unconstitutional legislation was again brought before the convention by Wilson and Madison, who, undeterred by the defeat of their previous efforts, and much to the declared surprise of Gerry, sought to revive the council of revision project with its joint executive and judicial membership. Despite their arguments for additional bulwarks the proposal was voted down after ample debate involving clear-cut assertions of the doctrines of "judicial control."[36] In this debate Caleb Strong of Massachusetts declared that he agreed with Gerry that judges should not share in making the laws which must later come before them for action.[37] This statement when compared with Gerry's unequivocal opinions on the matter in the Convention and viewed in the light of Strong's own previous experiences, and his later opinions, leaves no doubt as to his adherence to the idea of judicial control.[38] Likewise Rutledge and Gorham on this occasion held almost the same language as Gerry and Gouverneur Morris, who were among the chief advocates of the abrogative functions of the courts.[39] Among the other notable statements in favor of judicial supervision were those of Luther Martin[40] who like Rutledge, Gorham and Gerry opposed the council of revision, and Mason,[41] who joined Wilson, Madison, Morris, Strong and Ellsworth in supporting it.

The discussion of the matter of securing a sanction for the "supreme law," involving the questions of legislative or popular

[35] Ibid, ii, 39, 46.
[36] Ibid, ii, 72–80.
[37] Ibid, ii, 75.
[38] He had been an attorney in Brattle vs. Hinckley in 1786. Cf. Goodell, 7 *Harvard Law Review*, 415. He was also active for the judiciary act of 1789.
[39] Farrand, ii, 79, 80. Cf. ii, 298–301.
[40] Ibid, ii, 76.
[41] Ibid, ii, 78.

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ratification, and of oaths to support the Constitution (July 23) afforded Gerry, G. Morris and Madison another opportunity to express their constant and definite adhesion to the doctrine that the judiciary could nullify objectionable legislation.[42] Madison declared that "a law violating a constitution adopted by the people themselves would be considered by the judges as null and void."[43] (Other members known to have been present during this discussion were Houston of Georgia, Spaight, Martin of Maryland, Mason, Gorham, Ellsworth, King, Daniel Carroll, Williamson, Gen. C. Pinckney, Wilson, and Randolph, as well as Langdon and Gilman, who arrived that day from New Hampshire.) The day following this debate of July 23 was appointed the committee on detail which reported on August 6.

While the report of the committee of detail was under consideration by the convention, Madison on August 15, brought in a new scheme for the revision of acts of Congress upon their passage by either the Supreme Court or the executive, or both.[44] But Congress should be able to pass the vetoed act over the negative of either executive or court by a two-thirds majority, over that of both court and executive by a three-fourths majority vote. Charles Pinckney at once objected that the judges ought not to interfere in legislative business which would involve them in politics "and *give a previous tincture to their opinions.*"[45] The very obvious inference that Pinckney expected the court to have to decide later, in the ordinary course of judicial business, upon the validity of acts of Congress seems unavoidable when we find that Mercer at once arose and protested against this general theory that the courts could negative an unconstitutional act. Here Gerry, the constant expounder of judicial abrogation, protested that this matter had been settled, that the convention had already voted the council of revision down. Thereupon the convention confirmed their former decisions and by rejecting Madison's motion by an 8 to 3 vote definitively settled the issue.

[42] Farrand, ii, 89–93.
[43] Farrand, ii, 92.
[44] Ibid, ii, 294, 298, ff.
[45] Ibid, ii, 298.

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However the debate continued upon the idea of judicial control, Dickinson recording his dislike of the theory but his inability to see a practicable substitute. No one else opposed the doctrine, while various others supported it. In this debate were Wilson, Madison, Gerry, Gorham, Mercer, Carroll, G. Morris, Ellsworth, Dickinson, Chas. Pinckney, Sherman and Williamson, while Strong and Mason are known to have been among the others who were present but did not speak.

Considering the celerity and decisiveness of the defeat of this council of revision idea even in new guise, also the definite mentions of acts of Congress, and of the Supreme Court, and remembering the various unequivocal statements of the judicial control idea, while also, at the same time, bearing in mind the extent of the discussion of the idea, first and last, not only on this day but upon numerousother occasions of which this debate was the climax surely then it would seem that the action of August 15 should leave little doubt of the definite acceptance of judicial revision by the convention. Indeed, is not this judgment confirmed when we stop to analyze the action of August 15? That is to say, what did or did not the rejection of the council of revision mean? This is easily answered if we but glance over the proceedings which immediately followed. Thus it meant first, as seen by the action of the same day, that executive revision was definitely accepted, but subject to passage over such a veto. Second, the debates of August 18, 20 and 27, and September 7 upon the plan of an executive advisory council of which the chief justice was to be a member, with its concomitant feature the requirement of advance opinions from the Supreme Court, in the manner of the Pennsylvania practice, all show clearly that judicial advice was not yet precluded.[46] And third, the speedy adoption, thereafter, of a liberal definition of judicial jurisdiction proves the broad recognition of judicial power. How much then, actually was rejected in voting down the council of revision? Apparently, only this, that the court should give no advance official ruling which might involve it in politics, trammel its subsequent deci-

[46] Farrand, ii, 329, 335, 341, 427, 542. Gerry on August 18, and G. Morris on August 27 opposed the inclusion of judges.

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sions, or subject its decisions to the possibility of being overruled by a coördinate branch of government. In short is not this a distinct recognition of the validity of the arguments put forward throughout the convention by the exponents of the judicial power, viz. the absolute importance of the separation of the powers of government and the independence of the judiciary with the necessary corollary that by its very nature such a judiciary must take cognizance of all laws and determine independently as to their binding force.[47] Hence the participation of the judiciary was unnecessary as well as impossible in any plan for preliminary revision of Acts of Congress.

The consequence of this action of August 15, however, is seen, and best appreciated in the equally decisive action which came just eight days later, in the confirmation of the doctrine of judicial power thus implicitly comprehended in the Constitution. This was when on August 23rd upon the motion of Rutledge, the convention "Expunged in the VIII article the words *the acts of the Legislature of the United States* and *of this Constitution* so as that the Constitution and laws made in pursuance thereof, etc. should be the supreme laws of the several States."[48] Thereafter followed a final effort by Pinckney and Broom to carry the action further by resurrecting, in modified form, the congressional revision plan. But a test vote showing it was disfavored the motion was withdrawn.[49] Nevertheless it evoked a considerable discussion participated in by Sherman, Langdon, Rutledge, Williamson, Mason, Ellsworth, Madison, G. Morris and Wilson, besides Chas. Pinckney.[50] Also present, but not debating, were McHenry, Gerry, Luther Martin, Dayton, Randolph and King. Langdon favored the motion because he wanted a national construction of the national Constitution.[51] Rutledge, on the other hand,

[47] The full force of this argument can be appreciated only by an extended analysis of the constitutional views expressed in the convention with copious citations, obviously impossible in this article. See however the review of McLaughlin, Pope, and Corwin above. All these contribute pertinently to this subject, especially Professor Corwin.

[48] Farrand, ii, 393.

[49] Farrand, ii, 390, 391.

[50] Ibid, ii, 281-2, 389, 395.

[51] Ibid, ii, 391.

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declared *congressional revision* would "damn the Constitution with the people."[52] Sherman, moreover, thought it unnecessary, the laws of the general government being already supreme and paramount.[53] Williamson held with Sherman, and the other debaters generally expressed views favoring the supremacy of national law.[54] Indeed to use Madison's later words: "In every proceeding in the Convention where the question of paramountship in the laws of the Union could be involved, the necessity of it seems to have been taken for granted."[55] And again: "Every vote in the journal proves a unanimity of the delegations on this point.[56]

The net result of the action of August 23 had been to make of Luther Martin's resolution of July 17, save for a few verbal changes, the ultimate supreme law clause for the States. Of the changes in wording the most significant was that reported September 12, by the committee of style and accepted on September 14 by the convention, whereby the "supreme law of the several States," became "the supreme law of the land."[57]

Meanwhile the real climax in the process of incorporating the essentials of judicial revision into the Constitution had come on August 27, when upon motion of Dr. Johnson, certain pertinent words borrowed from the supreme law clause were interpolated in Madison's clause of July 18, on the judicial power, so that its jurisdiction should "extend to all cases arising under the Constitution of the United States" and acts of Congress; while Rutledge got the addition of national treaties.[58] Thus was the *national* supreme law clearly defined and entrusted to the *federal judiciary*.[59] It was certainly in keeping with the spirit of the day,

[52] Ibid, ii, 391.

[53] Ibid, ii, 390.

[54] Ibid, ii, 391.

[55] Ibid, iii, 523. Cf. also iii, 516, 522, 538, etc.

[56] Ibid, iii, 527.

[57] Note the striking utterances of Madison and Mason on September 12 on the paramountcy of national law. Farrand, ii, 587 and 588.

[58] Farrand, ii, 430 and 431.

[59] The use of "judicial power" for "Supreme Court" was due to Madison and G. Morris. Farrand, ii, 431.

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that a motion to make the exercise of the judicial power depend upon legislative regulations was defeated by a 6 to 2 vote.[60]

Although doubtless only a matter of regular order of business, yet it is a significant sequence that from the framing of the judiciary clause the convention turned to the consideration of the limitations upon State and Congressional legislation which should, be made in pursuance of the Constitution.[61] Is is not surprising then, that in the debate of August 28, Gouverneur Morris, like Williamson a few days earlier, should hold up the judicial power as the shield of the Constitution against infractions of these injunctions and prohibitions, or that Madison should assert that "Judges would be obliged to declare *ex post facto* laws null and void."[62] Thus from the situation illustrated by the circular letter of April 13, had emerged in the convention the devices we have traced for controlling both state and national legislation, while their incompatibility with the governing political principles of the day had brought instead the consummation of a restraint by laws in the veto provision of August 15, the "supreme law clause of August 23, with its culmination in the "judicial clause" of August 27, shown on August 28 to be the final sanction of both state and national judicial supervision.

These discussions in committee of the whole or in full convention are, however, by no means the sole test of the careful consideration given the potential supreme law article, or the judiciary proviso, by the "framers," for the labors of the committee of detail, 26th July to 6th August, and of the committee on style September 8 to 12 can not be disregarded.[63] On the former committee were Rutledge, Randolph, Gorham, Ellsworth, Wilson, all of whom had, it seems, favored judicial control within the

[60] Farrand, ii, 431. Note also the earlier discussions of that day and the dominant desire of the Convention for a distinct and independent judicial power. Ibid, 426, ff.

[61] Farrand, ii, 439, ff.

[62] Morris. Cf. Farrand, ii, 439. Madison, Ibid, 440. Cf. also General Pinckney's arguments on the independence of the judges in a debate of August 27 on salaries. (Farrand, ii, 429.)

For Williamson's statement on August 22, cf. Farrand, ii, 376.

[63] Farrand, ii, 128–190 and ii, 581, 585.

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few days prior to their appointment just as they did later.[64] Wilson a pronounced exponent of judicial paramountcy was apparently the dominant mind of this committee. The committee considered the Randolph, Pinckney and Paterson plans, as well as the views indicated, touching them, by the committee of the whole, for they had attended all the important debates upon these and other propositions.[65] It is hardly conceivable that these men had not weighed the import of the supreme law clause which they reported in their draft of August 6.[66] Similarly it was as to the committee on style composed of Johnson, Hamilton, G. Morris, Madison, and King all of whom accepted or showed their clear realization of the important function of the judiciary touching the Constitution. Moreover we have the statement of Morris[67] himself, whose services are attested by Madison,[68] that in recasting the form of the judiciary clause he used his own notions as far as possible.[69] Morris also, evidently reworded the supreme law clause, using "law of the land" instead of "law of the several States."[70] The report of this committee became in all essentials the ultimate constitution. As it will scarcely be disputed that in such cases of committee legislation—whether initial, or revisionary, as here—the opinions of the members concerned are held to be the best criteria of the intentions of any such legislation, it is but reasonable to hold that the known opinions of the members of these two committees on the formulating of the Constitution, should merit at least special attention.

[64] Rutledge and Gorham are omitted in Professor Beard's list of advocates of judicial review, but cf. Farrand, ii, 79–80, 298–301, etc. Cf. Beard, op. cit, pp. 17–64.

[65] Such for example as Hamilton's plan. Farrand i, 293.

[66] For evidence as to the work of the committee see Meigs, *Growth of the Constitution*, p. 281, ff., especially as to the substitution of the judiciary clause (art. ii, sec. 2) in Randolph's draft in place of a clause crossed out which had invested in the Supreme Court decision as to the nullity of a law repugnant to the Constitution. Also cf. Farrand, ii, p. 183. See also my subsequent evidence as to their individual views.

[67] Morris to T. Pickering, Farrand, iii, 419.

[68] Madison to Sparks, Farrand, iii, 498.

[69] Cf. Beard, *Supreme Court*, etc., p. 66, note on Morris's statement as interpreted by McLaughlin.

[70] Supreme law clause, art. vi, sec. 2. Judiciary Clause, art. iii, sec. 2.

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In considering the work of the convention as a whole, while we may admit the lack of a definitive vote on the specific question of judicial supervision; nevertheless in the light of the cumulative evidence of so many debates involving the doctrine; considering the unanimous attitude of the committees; and, above all, in view of the naturalness and completeness to be seen in the evolution of the application of the doctrine through the supreme law article of the States, into the supreme law clause of the Union, it would seem thus almost indisputable that judicial control was at least *implicitly* included in the Constitution by its framers who apparently saw no need of an express statement. Indeed the action of August 15 and 27, comes surely very *near* to a formal adoption of this important doctrine. Moreover it seems valid to reason, as does Professor Beard, that when a legal proposition before a legislative body is commonly and clearly stated by its supporters to involve certain fundamental implications and yet the measure is passed without the implications being controverted, then "those implications must be deemed part of the legal proposition when it becomes law."[71] And in fact the convention itself by its tacit acceptance of Madison's interpretation of the jurisdiction of the judiciary clause, furnishes an excellent proof of the validity of this logic.[72] And yet equally pertinent is Professor Beard's conclusion that to say the convention passed definitely upon every inference that could logically be drawn from the language of the instrument that it adopted would of course be absurd.

If, however, the cumulative evidence of this work of the convention, itself, should seem inconclusive as to the the adoption of the current judicial revision ideas as an inherent feature of the Constitution, yet we have still a resource by testing the views expressed or acted upon by individual members of the convention, either at that time, or within a reasonably contemporaneous period before or after the framing of the Constitution. This has been attempted more or less by most writers upon this subject but probably by none as thoroughly as by Professor Beard. Of the fifty-five delegates who actually attended the convention during

[71] Beard, *Supreme Court*, etc., pp. 63–64.
[72] Farrand, ii, 430.

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part or all of its duration, he lists twenty-five who were, in his opinion, the most active and influential. From the twenty-five he finds that seventeen should be listed as showing definitely that they *comprehended* the doctrine of judicial control and *either frankly approved it, or at least acquiesced in it.* His poll is Blair, Dickinson, Ellsworth, Gerry, Hamilton, Johnson, King, Madison, Luther Martin, Mason, Gouverneur Morris, Robert Morris, Paterson, Randolph, Washington, Williamson and Wilson. To this list, moreover, at the suggestion of Professor McLaughlin, he adds Livingstone, and Brearly of New Jersey.[73] Also of minor members of the Convention he cites as favorable to judicial control, Baldwin and Few of Georgia, Strong of Massachusetts, Read and Bassett of Delaware and Wythe of Virginia. For the opposition, on the other hand, he lists Mercer of Maryland, Spaight of North Carolina and Gunning Bedford of Delaware with perhaps, also, Butler of South Carolina and Langdon of New Hampshire.

It has been objected to this list that the inclusion of Washington for signing the judiciary act of 1789, of Senators Johnson and Robert Morris for their votes in favor of that act, and perhaps of Butler and Langdon for opposing it, is an unwarranted assumption.[74] On the whole there is validity in the objection although it would seem not to allow sufficiently for Professor Beard's stress upon the fact that he was showing that these men must have been cognizant at least of the idea of judicial control as it was again clearly expressed in the judiciary act, and that nevertheless they took their action despite this cognizance.[75] Surely serious objection can not be made to this close linking of the judiciary act and the two pertinent clauses of the Constitution on the judiciary powers,[76] with the intention of showing the principle of judicial revision in each, for such connection was not only recognized by the Senate in framing their act, and thereafter

[73] Professor McLaughlin follows Scott. Cf. *American Historical Review*, iv, 456.

[74] Dr. W. F. Dodd in *American Historical Review*, xviii, p. 380.

[75] It is very true, however, that Professor Beard makes a stronger claim on p. 51 which justifies the criticism of Dr. Dodd.

[76] That is, art. iii, sec. 2; art. vi, sec. 2.

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generally in the sessions of Congress, but it was expressly employed by Madison in 1835.[77]

Moreover as to the specific names challenged a somewhat stronger inferential, or even definite, case could be made that Professor Beard presents, had he carried his research further. Thus Washington's statements in appointing his first judges,[78] and his attitude with respect to the pension act cases, and to the test case on the carriage tax are stronger evidence bearing out our inferences drawn from his signature of the judiciary act. At least they were strong enough evidence to be so cited in congressional debates of 1802 upon judicial control.[79] Also while it is true that the Senate journals give no clue to the votes upon the judiciary act of 1789, yet Maclay's *Journal* affords clues as to the attitude of various senators like Robert Morris, Dr. Johnson, Bassett, Strong and others, and it particularly shows the influence of such advocates of judicial power as James Wilson and Judge McKean upon the votes of Robert Morris and the congressmen from Pennsylvania including George Clymer, and Thomas Fitzsimmons, and through their activity upon the attitude of other congressmen.[80] As to Langdon and Butler, Professor Beard himself questions whether their votes on the act of 1789 really proves their opposition to judicial control, and justly so, for surely in the case of Langdon, at least, the records of the convention, as already seen, afford better evidence indicative of a different attitude.[81]

Practically every name listed as favorable, by Professor Beard, can be verified, and indeed, at times, with additional and sometimes stronger evidence than he presents. For example, Caleb Strong's attitude need not depend on his vote for the judiciary act, even when strengthened by Maclay's testimony, for surely his attitude in the convention shows clearly his acceptance of

[77] Farrand, iii, 538.

[78] Sparks, Washington, ix, 35, 49, 86.

[79] *Annals of Seventh Congress*, p. 48, 575, 698, 903, 918.

[80] Wm. Maclay's *Journal*, especially pp. 74, 78, 85, 91, 100–103. See likewise the letters of Muhlenberg (June 18, 1789) and of Robert Morris (August 24, 1789) to Judge Peters (*Pennsylvania Historical Society*, Peters MSS., vol. ix).

[81] Cf. Beard, p. 54. On Langdon, see p. 21 above.

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judicial control, and that, too, directly after having seen something of the working of the doctrine as attorney for the losing side in a so-called Massachusetts precedent.[82] Perhaps really the chief fault to be found with Professor Beard's study is that it could so easily have been carried further and made more conclusive. For surely his disclaimer of completeness can hardly prevent our disappointment that when so much was done the search could not have been prosecuted further, at least before the original article was republished in permanent form.[83] Neither can it obviate our surprise when—sometimes from his own quotations from the debates—one man is left and his fellow chosen, and especially when some of those "left grinding at the mill," like Sherman Rutledge, Davie, etc. have not been overlooked by previous writers upon this question.[84]

As it has not been the object of the present paper to make more than an incidental study of this phase of the subject we need not stop here to present our verifications of Professor Beard's poll of the opinions of the delegates, and may rather pass to some possible additions. In tracing the proceedings of the convention, we have already seen evidence of the attitude of Sherman and Rutledge which should certainly establish their adhesion to judicial protection of the Constitution. In fact Sherman is accepted by some writers on the subject upon *less* data than is here presented. But Gorham, Charles Pinckney, Strong and Langdon, make the same arguments as, and usually align themselves with, men whose favorable opinion as to judicial review is regularly admitted. In all these debates the doctrine was broached and these men who attended regularly and participated intelligently in several such debates must surely have known

[82] On Strong see p. 16, notes 3 and 4 and p. 17, n. 1, above. It is of course not yet certain that Brattle vs. Hinckley was a bona fide precedent.

[83] Cf. Beard, op. cit. p. 16. The original essay appeared in the *Political Science Quarterly*, March, 1912. Cf. Beard op. cit, p. 56–63. Note omission of Strong and Gorham.

[84] Cf. Meigs, *Growth of the Constitution*, vi. 243–52, etc., 281–87. Elliot in *Political Science Quarterly*, 231. Meigs, 19 *American Law Review*, p. 175. 23 *American Law Review*, p. 394; 40 *American Law Review*, p. 380. Burr, 68, *University* of *Pennsylvania Law Review*, 636, etc.

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what they were discussing. Certainly the public careers of the men in question do not indicate any mental denseness upon political problems. In no instance, moreover, which careful search has revealed, do these men take opposing ground during the period contemporaneous with the adoption of the Constitution. While this may be fraught with the usual dangers of inferences, yet we certainly may accept as significant the *uncontradicted inferences indicated by their colleagues during these very debates.*[85]

Among others who participated effectively in at least one of the several crucial debates affecting the judiciary, were Franklin, Daniel Carroll, Gen. C. C. Pinckney, Dr. McClurg, Broom and Lansing. The evidence as to their precise opinions is, to be sure, regrettably meagre, but it is surely sufficient to indicate that they must have *understood*, at least in a general way, the doctrines of the judiciary functions there set forth.[86] Yet of the six, inference suggests only Lansing, who left the convention about July 5, as probably opposed to judicial control; while Carroll's votes in the first Congress, and certainly General Pinckney's[87] speeches in the South Carolina legislature in January, 1788, go to confirm inferences of a favorable attitude. McClurg so rarely spoke that his expressed opinions are not easily found, but on July 7 following one of the important debates on judicial power in which much stress had been laid on the argument of an independent judiciary as a factor in judicial control, he stated his belief that both the executive and the judiciary should be equally independent.[88]

Dayton and McHenry who shared in the unanimous vote on August 23, to amend the supreme law clause might also be assumed to have had an understanding of the attendant proceedings. Certainly McHenry's note of the action is unequivocal,[89] while

[85] Cf. especially the debate of August 15. Farrand, ii, 298, etc.

[86] For these men note discussion on pp. 13–23 above; especially p. 13 for Franklin, and p. 21 for Broom.

[87] Elliot's *Debates*, iv, 226. The issue to be sure was specifically as to the nullity of laws contravening a treaty. But note also his plea in Bowman vs. Middleton (1791), 1 Bay 254. Cf. also his statement of August 27 on the importance of the judiciary. Farrand, ii, 429.

[88] Farrand, ii, 33, etc.

[89] Farrand, ii, 395.

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Dayton proved his faith at the first testing time on January 9 and 10, 1793, when he distinctly voted for judicial revision of acts of Congress. Besides Dayton must have shared his colleague's knowledge of the New Jersey precedent in which Brearley, Paterson, and Livingstone had all been concerned.[90] George Clymer of Pennsylvania is another regular attendant of the convention whose consistent votes there, and his course as a thorough-going Federalist in the first Congress, when viewed in the light of his intimate friendship with James Wilson go far to create a presumption that he was a believer in judicial control, although a thorough search of private as well as public papers has yielded no specific evidence.[91] For Thomas Fitzsimmons another Pennsylvanian in the convention and in the earlier sessions of Congress whose votes on questions affecting the judiciary usually accord with those of Clymer, we fortunately have confirmation of his opinions in his votes for judicial review in January, 1793.[92] Happily still another minor member of the convention, Davie of North Carolina, Judge Iredell's law partner and significantly connected with him in the notable case of Bayard vs. Singleton,[93] which established judicial control in his own state during the very days of the Philadelphia convention, also, like Iredell, expressed his views so clearly in the North Carolina convention of 1788 that we can easily place him among the known advocates of the judicial function of thwarting unconstitutional laws.[94]

With all due allowance for the precariousness of the evidence for certain of the foregoing cases nevertheless it is clear that the

[90] Cf. Austin Scott, 4 *American Historical Review*, p. 456. See also Breakley's significant letter of April 14, 1784, to Dayton (*Pennsylvania Historical Society*, Dreer MSS.). For the votes of January, 1793, cf. Journal of House of Representatives, Second Congress, p. 658–59.

[91] I wish to express my appreciation to the descendants of George Clymer who sought to find and place at my disposal all existing family papers, and to Mr. B.A. Konkle who made a search for me of the Wilson papers in his hands. See *Annals First Congress*, p. 382, 489, 585, 591, 710, 735, etc.

[92] Cf. Note 90 above as to votes of 1793. Note also Fitzsimmons's petition to Congress, 16 Feb. 1802, *Annals Seventh Congress*, p. 188.

[93] Cf. Thayer's *Cases in Constitutional Law*, i, 78–90 or 1 Martin, No. Ca. Reports, 42.

[94] Elliot's *Debates*, iv, 156.

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roll of members of the convention whose views upon judicial review is ascertainable should be extended. Thus to the twenty-five whom Professor Beard cites as favoring the doctrine should surely be added Rutledge, Gorham, Sherman, Chas. Pinckney,[95] Gen. C. C. Pinckney, Davie and probably Langdon (transferred from the opposition list). While inference based on *evidence of intelligent participation in the critical debates without opposing the assertions* of judicial control made by the leading debaters in the convention—evidence frequently supported by other proofs —would suggest that Dayton, Clymer, Broom, Fitzsimmons, and probably McClurg, Carroll, and Franklin *were either adherents of the idea or at least friendly neutrals.* To professor Beard's "opposition" list might be added Lansing of New York, but on the other hand Langdon should be counted as favorable. Indeed Mercer, judging by the votes from Maryland, despite his protest on August 15, probably like Dickinson acquiesced in the *fact* of judicial control, or was shortly converted to it for he fully accepted it when it was first nationally tested.[96] In short the foregoing evidence would indicate that of the fifty-five actual members of the federal convention some thirty-two to forty of them, that is two-thirds of the Convention and including nearly every influential member, upheld or accepted the right of the courts to disregard as law any unconstitutional legislation; while four or five members apparently opposed it.[97]

There remain then some ten members whose views have not yet been ascertained. Among these are Yates of New York who left on July 10, Pierce of Georgia absent after July 1, and Houstoun who probably left about July 26, also Ingersoll and Mifflin of Pennsylvania, Bount and Alexander Martin of North Carolina, Houston of New Jersey, Jenifer of Maryland, and Gilman of New Hampshire. Yet even touching certain of these there

[95] Chas. Pinckney seems to have changed his opinions for a time about 1799–1803. As to his views, cf. Farrand, i, 131, 139, 140, 144, 150, 162, 164, 169, 171, 173; ii, 28, 298, 382, 390; iii, 427, 503, 506, 509–10; Elliot's *Debates*, iv, 257–58; Wharton *State Trials*, 412 (1799); *Annals Sixth Congress*, p. 101 (1800).

[96] Farrand, ii, 294 ff. and Journal, House of Representatives, Second Congress pp. 658–9.

[97] Obviously the sliding scale allows for the rejection of the less definite cases.

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are some indications as to their attitude. Thus though Gilman and Langdon arrived late, yet they heard the most important debates touching the judicial power and the vote of New Hampshire was regularly accordant with votes favoring that power. Gilman also voted thus in the first congress as far as can be determined and though like Gerry, he voted with the opposition on January 9, 1793, yet on the final passage of the amended pension act (January 10) he changed his vote.[98] Both Blount of North Carolina and Pierce of Georgia were members in Congress on March 20, and April 3, 1787, when they agreed to the circular letter which contributed so much toward the wider recognition of the judicial power, and they doubtless shared the views of the other four elected members of the federal convention then present, King, Madison, Johnson and Few who are commonly admitted as favorable to judicial review.[99] As to Houston of New Jersey there seems no strong reason why he should be singled out from the other members of the New Jersey delegation, with whom he voted, and with whom he must have shared any impression in favor of judicial revision incident to the Holmes vs. Walton precedent.[100] For the news of this case evidently reached Congress while Houston was attending in 1780, and besides as clerk of the superior court of New Jersey in 1781 he could hardly escape full knowledge of their significant decision of the previous year. Although Yates of New York left the convention his notes echo the first discussions on judicial revision and if he were the author of the Brutus letters[101] in the *New York Journal and Weekly Register*, it is clear that while he may not have favored judicial control yet he clearly recognized it as a feature of the Constitution. Doubtless equally interesting indications could be found

[98] House Journal, First and Second Congress, pp. 658–59.

[99] *Journal of Congress*, 1787, pp. 32 ff. That Pierce fully comprehended the significance of judicial review is proved by his notes for June 4 (cf. Farrand, 1, 109).

[100] Cf. A. Scott, 4 *American Historical Review*, p. 456, and W. M. Meigs, 47 *American Law Review*, p. 691.

[101] Cf. Ford's *Pamphlets on the Constitution*, bibliography, no. 133; *Debates and Proceedings of the Massachusetts Convention, 1788*, pp. 366–98. Also cited by Davis: *Political Science Review*, November 1913, pp. 541–87.

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touching the attitude of the five remaining members Ingersoll, Mifflin, Jenifer, Alexander Martin of North Carolina, and Houstoun of Georgia, none of whom certainly attempted to dispute the opinion of the vast majority of the convention, and all of whom apparently advocated the adoption of the Constitution by their States.

If out of fifty-five members of the convention but five remain without our having direct evidence or at least some specific *clue* as to their *attitude*, beyond the fact that they never openly opposed judicial control, and if, moreover, but a half dozen can be found to have seriously disbelieved in or even objected to the doctrine of judicial power, what reasonable doubt can there be that the common, and indeed the logical interpretation of their work, shows their real intention that the Constitution should find in the courts a bulwark against its infraction. Verily stronger confirmation of our chief contention could scarcely be desired than that afforded by the so-called opponents of the doctrine themselves as shown by Mercer, Dickinson and Yates, that judicial control clearly was wrought into the fabric of the Constitution.

Admittedly there must have been variant interpretations of judicial control, various degrees of acceptance thereof, in such a body as the convention of 1787. Probably few recognized or could have prophesied its efficacy as a protection of the Constitution. Certainly even its stanch friends like Wilson advocated the council of revision as an additional safeguard. Even with its zealous advocates it was recognized as it has been ever since, and is recognized today, as but one of various checks and bulwarks provided against usurpation and unconstitutional action on the part of the States, or of branches of the federal government. It is therefore but natural that in some cases time may have been needed to strengthen and clarify the adherence of members of the convention to judicial revision. Also, undoubtedly, the arguments and motives for their acceptance of judicial control must have varied with different members of the convention. Some doubtless acted upon logical grounds in accordance with the dominant theories of the period, others probably were induced by the necessities of the situation, and even by the very compulsion of

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the growth in the expression of the principle by the convention, while still others evidently were influenced by experience with various checks against usurpation. Upon those of the third category surely the precedents for judicial revision in some seven or eight of the thirteen states could scarcely have failed to make a serious impression. In fact Gerry and Madison, if not others, cited such cases as good argument before the convention.[102]

Neglecting, as we may, precedents for judicial abrogative revision in the colonial period, as not pertinent since they are dubious or in any case have no traceable influence upon judicial control under the United States, we may note instead what local instances of such power apparently did influence the Fathers in their task of establishing a more perfect union.[103] A number of such state precedents—or, in some cases, "near precedents," since they are of varying scope and force—occurred prior to the first federal exercise of the power in 1792–93, and indeed most of them prior to the adoption of the Constitution.[104] We may note: (1) the influential *New Jersey* decision of Walton vs. Holmes, 1779–80; (2) the usually-cited *Virginia* precedents of Josiah Phillips, 1778 (dubious); Commonwealth vs. Caton, 1782 (not a decision); the Virginia judges, 1788 (merely assertions but very influential); and Kamper vs. Hawkins, 1793; (3) The *Pennsylvania* confiscation act opinion, 1782;[105] (4) *The New York* case of Rutgers vs. Waddington 1784 (abrogative construction); (5) The *Rhode Island* case of Trevett vs. Weeden (no decision); (6) in *New Hampshire* a case probably in 1785, and also M'Clary and Gilman and other cases in 1791;[106] (7) a *possible* instance for *Massachusetts* in 1786–87;[107] (8) Bayard vs. Singleton, the noted *North Carolina* precedent of 1787; and

[102] Farrand, i, 97; and ii, 28.

[103] For colonial cases see Hazeltine in *American Historical Association Reports*, 1894, p. 299 ff. and Channing, *History of the United States*, iii, pp. 498 ff.; 526.

[104] For State precedents see Elliot, 5 *Political Science Quarterly*, pp. 233-8; Coxe, *Judicial Power*, (cf. index); and Thayer's *Cases in Constitutional Law*, i.

[105] For the Pennsylvania precedent, I hope elsewhere to present my evidence, but cf. *Annals of Congress, First Congress*, p. 1925.

[106] For New Hampshire cases see Dodd, *American Historical Review*, xii, 348; Meigs, 47 *American Law Review*, 691. 1 New Hampshire Reports, 216 and Jeremiah Mason, *Memoir*, p. 26–27.

[107] Cf. A. C. Goodell, 7 *Harvard Law Review*, 415–24.

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(7) the subsequent *South Carolina* cases of Ham vs. McClaws in 1789 and Bowman vs. Middleton in 1792.[108] Thus judicial annulment was a recognized possibility in some two-thirds of the Union including every influential State, and was known practically from end to end of the confederation when the Constitution was adopted. This alone might warrant the assumption that the experience as well as the theory of such judicial power was not unfamiliar to most of the framers of the Constitution. And our assumption becomes a fact when we find that certainly Randolph, Madison,[109] Wyeth and Blair, Paterson, Livingstone, and Brearley, Hamilton, Gerry, Gouverneur Morris,[110] Strong,[111] Davie, Pinckney,[112] and others had personal information of these cases.[113] In short when so many members including most of the leaders of the convention had such intimate connection with the practice of judicial control, their statements and actions upon this point can scarcely be challenged.

The testimony already considered touching the dominant constitutional theories of the convention, as to the discussions and actions therein upon the judicial power, and the surprising degree of unanimity in the personal attitude of members, is most significant. Moreover what this threefold evidence tends to show with respect to the acceptance of judicial review as an inherent feature of the Constitution, is largely confirmed by the evidence from incidents of the adoption and inauguration of the new Constitution.

So much has been written upon this confirmatory evidence that we might pass it with the mere reminder of its existence were it not seriously challenged by a striking current article.[114] The

[108] 1 Bay 93 and 252.

[109] As to Mason's plea in 1772 see Elliot, 5 *Political Science Quarterly*, p. 235.

[110] For Morris's address to the Pennsylvania Assembly in 1785 cf. Sparks, *Life of Gouverneur Morris*, iii, 438.

[111] For Strong's connection with Brattle vs. Hinckley see Goodell, 7 *Harvard Law Review*, 415.

[112] For Pinckney's plea in Bowman vs. Middleton see 1 Bay, 254.

[113] In other cases, see Elliot, 5 *Political Science Review*, and Coxe, *Judicial Power*.

[114] H. A. Davis, Annulment of Legislation by the Supreme Court, 7 *American Political Science Review*, 541–87.

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writer of this article setting out with the avowed purpose of controverting Professor Beard's poll of the convention reaches the conclusion that some eleven members favored judicial control, sixteen were antagonistic and twenty-two were non-committal and hence, in *his* view, *necessarily to be counted with the opposition.* It is impossible to follow all the turns by which this result is reached, we may, however, note the chief arguments. Concisely stated, these are two. The *first* is that certain members did not preach judicial control as the sole and all sufficient panacea for possible wounds to the Constitution, or that if there are certain statements of theirs which can be construed as dubious for judicial control, therefore other weightier and more numerous evidences of their views on the other side, are to be counted as valueless. The *second* argues that the evidence of the ratification of the Constitution, and of the passage of the judiciary act of 1789, far from confirming the acceptance of judicial control, as commonly supposed, proves, instead, the rejection of the idea. It is hardly necessary to say that the first argument would disregard the context of statements cited, as well as the fact that a debater naturally controverts an opponent, if possible, squarely on the opponent's own argument. Likewise it fails to allow for the peculiar bias which heated argument for an unpopular cause ever gives, for the time being, to the loser's views. The second argument, however, being so flat a contradiction of commonly accepted views merits our closer attention.

Although the writer of the article in question admits the peculiarly unsatisfactory evidence, for his purpose, afforded by ratifying conventions, many of which were so unanimous as to adopt the constitution without recorded debate, nevertheless he announces his purpose to build upon this evidence the chief structure of his disproof of the acceptance of judicial revision. The results of an extended discussion, involving some generally neglected evidence, is on the whole an abler exposition, than even writers holding a brief for the other side have usually presented, that the right of the courts to abrogate unconstitutional legislation was stated or expounded during the ratifying campaign in at least eight or nine of the States. In some cases he admits that it was fully expounded

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as in Virginia and Pennsylvania, with the result that even the opponents of the Constitution adopted the language of the doctrine.[115] To effect such results he stresses the fact that there was wide opposition to the judiciary provisions of the Constitution and many proposals to restrict the scope of national courts. He fails, however, to show by what art he has transmuted the provincial outcries against distant courts, trials without juries, the swallowing up of state judicatories, the nationalization of the government through the "sweeping clause" and all like last-ditch shibboleths of the Anti-Federalists into genuine opposition to judicial annulment. That there was a certain amount of real opposition to, or questioning of the doctrine surely no one would deny, but that opposition reached the proportions Mr. Davis would see, even he must admit remains unproved. For if, as he implies, all efforts to amend the Constitution by restricting the scope of court jurisdiction were directed against the revisionary function, what better proof could be desired that this function was everywhere recognized as an integral feature of the Constitution, and the corollary is then also unescapable that the Constitution was *not* so amended. Yet it is doubtful if even the most persistent defenders of the courts would pretend such unanimity of recognition of judicial control by the men of 1788. One other aspect of the astonishing treatment of the evidence from the conventions can scarcely be passed over. It is seen in the discussion of the North Carolina convention of 1788, where only Steele is credited with a statement of the revisionary doctrine.[116] Maclaine, it seems, declared that the people would prevent legislative usurpation, therefore he of course rejected judicial control.[117] What Maclaine said later in the day, however, touching the judiciary we are not told.[118] Neither are we told of the able exposition by Davie,[119] or the statements of Johnston[120] and

[115] Cf. "Centinel" in Pennsylvania.
[116] Elliot's *Debates*, iv, 71.
[117] Ibid, 161.
[118] Ibid, 164, 180-82, etc.
[119] Ibid, 156-160, 181.
[120] Ibid, 187-8.

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Cabarrus,[121] all Federalists. Indeed had even Iredell's remarks[122] been followed through the debate of July 29, there would hardly be grounds for the broad suggestion that the strongest Federalists deliberately dodged the topic of judicial control in the ratifying conventions.[123]

In the face of Mr. Davis's examination of the question we can therefore, if anything, the more boldly repeat, that the doctrine of judicial power was asserted favorably or otherwise in nine States. In Pennsylvania this assertion was through the able expositions of Wilson and McKean;[124] in Virginia it was made by Marshall, Grayson, Pendleton, Randolph, Patrick Henry and others;[125] in Connecticut by Ellsworth;[126] in Massachusetts by Samuel Adams;[127] in Maryland, Luther Martin, despite the possible construction of certain of his words;[128] Dickinson in Delaware;[129] Hamilton and others in New York;[130] Rutledge, C. C. Pinckney and others in South Carolina,[131] and in North Carolina Davie, Iredell and the rest. If in various cases only partial aspects of the doctrine were discussed, it was because the doctrine was but *partially questioned*—and *that*, usually, by states' rights advocates. No one, however, can deny the breadth and nation-wide appeal of the expositions by Madison and Hamilton in the Federalist,[132] or Wilson's widely circulated speeches.

Undaunted, however, by the lean harvest afforded by the records of the ratifying period Mr. Davis has been forced by the exigencies of his case to attack the validity of the use of the first judiciary act as evidence supporting the legality of judicial annul-

[121] Ibid, 184.
[122] Ibid, 178, 179, 185, etc.
[123] Davis, 7 *Political Science Review*, p. 580.
[124] McMaster and Stone: *Pennsylvania and the Federal Constitution*, pp. 305, 340, 354, 766.
[125] Elliot's *Debates*, iii, 205, 299, 325, 443, 539–41, 548, 553, 567–69.
[126] Elliot, ii, 196.
[127] Ibid, ii, 151.
[128] Elliot, i, 380; Farrand, iii (see index).
[129] R. L. Ford, *Pamphlets on the Constitution*, p. 184.
[130] Elliot's *Debates*, ii, 348, 362, etc.
[131] Ibid, 266–70.
[132] Especially numbers 32, 39, 44, 78–82.

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ment. With a dexterity and nimbleness which Judge Gibson could not attain, he goes beyond the decision of Eakin vs. Raub[133] and boldly asserts that because the twenty-fifth section of this judiciary act does not state specifically that federal courts, as part of their original jurisdiction, shall declare the nullity of acts of Congress then of course the act was a valiant attempt to restrict and throttle judicial revision and hence all who favored the act in any way (whatever they might have previously and subsequently said in favor of the doctrine being deemed worthless) are certain opponents of the idea. Thus by one fell stroke, Ellsworth, Paterson, Robert Morris, Washington and the rest are transferred to the ranks of the opposition.[134] To do this Mr. Davis deliberately ignores the fact that the real object of the judiciary act is to put into effect the supreme law and judiciary clauses of the Constitution, and its real animus the desire to set the seal at once upon the great achievement of the Constitution, the future prevention of provincial nullification of the paramount law.[135] In short the curbing of Congress was not here a direct issue. Why also, it was *not an issue* Mr. Davis might have found in Maclay's *Journal*, and above all in the great debate on the removal power and the department of foreign affairs of neither of which source of information was he ignorant.[136] In fact a fuller recognition, a *sanction*, *definition* and *prediction* at once, of judicial supervision of Congressional Acts could scarcely be desired than is afforded by this debate of June 1789, which is but the fullest of some eight or more instances in which the first Congress registered its faith in the judicial power. That this Congress could not have misinterpreted the intention of the Constitution is

[133] 12 Sergeant and Rawles's (Pennsylvania) Reports, 330. Cf. discussion by Pope, 27 *Harvard Law Review*, 52 ff.

[134] For Paterson's incontrovertible consistency see p. 202 below (in part).

[135] Also, as Madison and Smith of South Carolina expressed it, to make the national judiciary coextensive with the national legislature. Cf. *Annals of First Congress*, pp. 812, 816.

[136] Maclay, Journal, pp. 85–87, which shows conclusively that the 25th section of the act was forced by the appellate jurisdiction granted the Supreme Court by the Constitution itself; also *Annals First Congress*, pp. 459ff. Note the references to both, in Mr. Davis's article, for other points.

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assured when we find in the Senate ten framers of that document, viz: Ellsworth, Paterson, Few, Strong and Bassett of the Committee which framed the judiciary act, Robert Morris, Johnson and Read who approved it, Langdon and Bedford who opposed it, while in the House were Gerry, Gilman, Carroll, Sherman, Clymer, Baldwin, Fitzsimmons and Madison, that is fully one-third of the membership of the federal convention.[137]

Truly Mr. Davis well admits that in his conclusions he walks on dangerous ground for he disagrees in his interpretation of the judiciary act, and of the constitutionality of judicial review not merely with the one authority to whom he alludes, but rather with the vast majority of authorities—legislators, judges, constitutionalists and historians alike—since 1787.[138]

In view of Mr. Davis's insistence in his interpretation of the judiciary act, and elsewhere, on the distinction between coördinate judicial review, and review by a superior court of acts of a subordinate legislature it may well be asked why no deliberate effort has been made to emphasize such a discrimination in our review of the action of "framers," "ratifiers" and "inaugurators" of the Constitution. The answer is that in so doing we have sought to adhere the more faithfully to the natural evolution of the full idea of judicial control as it developed in the federal convention. For the evolution was truly an organic growth, and we are holding no political clinic for the disservement of its members. That there is a practical distinction between abrogation of state laws, and that of national laws by the federal judiciary cannot be denied, yet clearly the fundamental principle involved is alike in both. Indeed, even had we no evidence of the unity in development of the *full* doctrine of judicial revision in the convention, yet certainly evidence as to the acceptance of the doctrine in the one form cannot be denied to have at least inferential bearing upon the apparent attitude toward the other aspect of the question at

[137] Naturally Randolph and Washington might be counted with the eighteen members of Congress, since they concurred in the congressional action as to the judiciary.

[138] See 7 *American Political Science Review*, 582. As Mr. Davis does not name the "able scholar" who has pronounced his interpretation of the judiciary act "absurd" we are at a loss as to which one he may refer to.

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the time of the formation of the Constitution. For however precise may be the present attitude of some upon this point—admitting the constitutionality o fsupervision for the states, denying it for acts of Congress—yet we can hardly escape the evidence that such nice distinctions as to the principle involved were scarcely voiced at the adoption nor during the early interpretations of the Constitution, although the "Fathers" can hardly be said to have eschewed fine spun controversy.

That in fact the full principle of judicial supervision and pronouncement as to the validity of legislation was considered from the very initiation of the government under the Constitution to be an inherent feature of that instrument is attested by the action of all three governmental branches at that period. It is, however, impossible here to more than mention the convincing facts which form the remaining steps in the expression of judicial control prior to Marbury vs. Madison or which are, in other words, the remaining bases of Marshall's decision in that case.

Three of these steps—or bases—we have already seen. Thus we have stated the *theoretical sources* of the doctrine, we have examined the evidence of its *acceptance in the Constitution* and we have noted in the debates of the first Congress upon some eight occasions in 1789, and again in February, 1791, the *validation and definition* both of the *principles and application* of judicial control,[139] a legislative sanction in which there is ample evidence that the executive power concurred.[140] There remains then to indicate the progress—if it be called such—between 1791 and 1803.

The utilization of their function by the courts naturally came at the first opportunity. This step which followed speedily the expressed sanction of the coördinate branches was first taken in the cases of Hayburn, Chandler and Yale Tod, which grew out of the pension act of 1792.[141] This exercise of judicial independence was acquiesced in by Congress and the Executive and this

[139] *Annals of First Congress*, pp. 267, 439, 459–573, 661, 681, 819, 900, 1894–1928, etc., etc.

[140] Cf. Washington's letters to the judges in 1789-90. Sparks's *Washington*, x, 35, 49, 86, also Randolph's report of December 27, 1790.

[141] 2 Dallas, 410, also *Annals Seventh Congress*, 921–924.

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instance, as well as the decision in the test case of United States vs. Hylton wherein the Executive and Congress deliberately invoked judgment on the validity of the carriage tax, was regularly cited as valuable precedent until it was merged in Marshall's argument in 1803.[142] Moreover the cases of Van Horne's lessee vs. Dorrance[143] wherein Justice Paterson gave his masterly statement of judicial guardianship of a Constitution, of Hylton vs. Ware,[144] Calder vs. Bull,[145] Cooper vs. Telfair[146] and numerous others merely mark a continued exercise of the same power in varied but scarcely more impressive form; in several of which cases, it may be worthy of remark, Justices Paterson, Wilson and Iredell found opportunity to register their consistent adherence to judicial supervision.

The fifth evidence of the constitutionality of this function thus exercised by the federal courts, particularly in its national aspect is found in the continued acquiescence in and approval by Congress and the Executive both of their own original sanction, and of the current exercise of their so recognized function, by the courts. This is shown not only in the bringing of test cases by the President under direction and with the support of Congress such as the Yale Tod case, and United States vs. Hylton already noted,[147] but also in utterances in every Congress prior to 1802, especially in the debates of 1793, 1796, 1798 and 1801. While it must be said that none of these utterances mark a broader definition of the revisionary function, yet they do show a change, in the theoretical arugments advanced, from stress on judicial independence to emphasis on a separate, coördinate judicial power.[148] Likewise after 1798 signs of coming revolt may be detected,[149]

[142] 3 Dallas, 175.
[143] 2 Dallas, 308.
[144] 3 Dallas, 211–37.
[145] 3 Dallas, 386.
[146] 4 Dallas, 14.
[147] *Annals of Congress, Seventh Congress,* p. 926.
[148] The shift may be traced in the Jay treaty debates of March and April, 1796, in the House. Cf. *Annals Fourth Congress,* first session.
[149] As is well known the Kentucky and Virginia resolutions were a challenge to judicial control, and brought replies from most of the States generally defending

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although no attempt at a denial of the doctrine can be found in the congressional debates prior to the characteristically contradictory utterance of Charles Pinckney, March, 5, 1810.[150]

The situation in 1802–03 was ripe for the final step which should definitively mark the validity of judicial supervision. This was the able defense of the principle against the attack of a political revolution. Though the retort was as partisan as the challenge yet it brought out a full confirmation (in which even most of the opposition united) of the function of the independent coördinate judiciary to determine whether an act of the coördinate legislature, and executive shall have a legal status.[151]

What then was left for Marshall but to return the partisan challenge in the name of the judiciary by crystallizing with forceful logic the principles recognized by the framers of the Constitution, comprehended in that instrument, sanctioned and defined with the initiation of the new government, utilized by the courts, and commonly accepted theretofore and since by the nation.

the doctrine. See Ames' *State Documents on Federal Relations*. Also Anderson, 5 *American Historical Review*, 43 ff. See also Pinckney's 1799 letter, Wharton's *State Trials*, 412.

[150] *Annals Sixth Congress*, p. 101.

[151] *Annals Seventh Congress*, pp. 32–182, 529–975. In fact but three members of the House and one Senator denied the validity of judicial control.

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GOVERNMENT IN SPANISH AMERICA

BERNARD MOSES

Although the events of the recent Mexican tragedy cannot be seen today in as clear light as that which will be thrown on them for the next generation, still the political history of the communities established by Spain in America furnishes a certain measure of enlightment. This history seems to indicate that the Spanish colonies were unfortunate in that the government of the United States, in its early decades, appeared to them as a desirable model for the Spanish-American states that were created after the war of independence. The English colonies, left to themselves, had a normal development along lines determined by their environment and their inherent social forces. The Spanish colonies, founded by authority, were developed under a protective system designed to subserve the interests of Spaniards. The disappearance of the Indians before the invading English cleared the field for the democracy that was produced by the colonial conditions of the frontier. The incorporation of the Indians as a subordinate class in the colonial society of Spanish America, and the creation, by royal authority, of a titled nobility made democratic states impossible.

In view of this state of affairs, the principal leaders of the movement for the emancipation of the Spanish colonies opposed the project to set up democratic governments. But the restrictions of various kinds imposed by the authorities of Spain, and the exclusion of creoles from the high civil and ecclesiastical offices had caused the rise of a party hostile not only to Spain's administration but also to the political policy of the leaders of the revolution. This party, composed principally of creoles and mestizos, represented whatever public opinion existed in Spanish America at the beginning of the nineteenth century. The members of this party were especially influenced by the doc-

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trines of *The Rights of Man*, and by the successful experience of the United States; and, opposing the views of Bolivar and San Martin, they became the champions of democracy, and the effective advocates of a democratic policy for the new states.

The unsatisfactory consequences that have attended the attempts to carry out this policy hitherto have had their primary cause in the character of the society that came into existence in the colonial period. This society was undemocratic. It was composed of representatives of distinct races; and the lines separating classes were very rigidly drawn. Whether under viceroys, captains general, or governors of subordinate districts, this society was subjected to absolute rule for a period of two hundred and fifty years. All of its knowledge of government, and all of its political traditions, whether derived from Spanish or American experience, had imposed upon the public mind not the idea of government by law, but the idea of government by an individual person.

After this long schooling in absolutism, it is not strange that the Spanish-American nations have been disposed to fix their hopes on prominent leaders in times of political difficulty. Everywhere, even under a liberal representative régime, in seasons of distress and national anxiety, there is an apparently natural tendency on the part of the people to turn to some one man rather than to a congress or to a popular assembly. It was to President Lincoln and not to Congress that we looked for national salvation in the anxious days of the Civil War; and in these days of peace, if there is important legislation needed, we turn to the President, hoping he will espouse the projected measure and, as it is said, "force it through Congress."

During the colonial period, the municipalities of Spanish America were the only governmental organizations that were rooted in the people; and even these were established by individual leaders. In this undertaking the founder of a town acted with as much independence as a proprietor who would select a site for a mill or a manufactory. He caused the lots to be surveyed, distributed them among the actual settlers, and, in the first instance, appointed the regidores, or members of the municipal

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council. For subsequent terms these officers were elected by the citizens; but later, in many cases, the practice of election was set aside in favor of selling the places, and the sale was sometimes effected by public auction at the entrance of the municipal building. The office in possession of the purchaser was exploitable, like other property, and was liable to attachment for debt. The municipality was often subject to the arbitrary intervention of the governor of the little district in which it lay. This tended generally to destroy the independence of the council; but sometimes, through the conflicts induced by this interference, the towns learned how to defend their rights, and acquired a degree of self-confidence that gave them supreme importance as supporters of the creole-mestizo movement for emancipation.

When the Spanish power was overthrown, the municipality was left as the sole possessor of legitimate civil authority. Besides this, there was only social confusion and the acts of persons and groups without political responsibility; and the creation of a liberal government for each of the new states encountered a serious obstacle in the fact that all of the governmental traditions of these states were the traditions of Spanish absolutism. Moreover, the leaders of the various armies were in favor of the continuance of monarchical rule, and the mass of the people, ignorant of of any general government but that of the viceroy or the captain general, were in a condition to submit without difficulty to any dictator who might boldly proclaim his power. More powerful, perhaps, than any of these factors was the influence of the higher clergy and the members of the Inquisition. Devoted to the maintenance of a sanctified absolutism, these officials were opposed not only to the creation of a liberal government, but even to separation from Spain.

While there was no population outside of the towns that counted politically, the municipalities furnished organizations already formed, through which public opinion and the aspiration for independence might find expression. Moreover, when independence had been achieved, some of the towns that had acquired a certain degree of political prestige during the conflict, became too important in their own estimation to submit quietly to the

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rule of a general government, which was practically controlled by a rival city. Under these conditions, military leaders appeared as champions of the interests of their respective cities; and the habit of leading revolts thus acquired sometimes manifested itself when the interest of the leader was the sole or principal motive to action. Events of this kind were facilitated by the fact that, while one city might refuse to submit to the rule of a rival city, there were no traditions, either in the society of the colonies or in that of the republics, which sanctioned the popular control of persons in authority.

In an undemocratic society and under the influence of Spanish and colonial traditions in favor of absolute rule, the creation of a stable government as democratic as that of the United States was practically impossible; yet the creole-mestizo element of the population, that had caused the rejection of the monarchical idea, was dominated by the thought that the northern republic might be closely followed as a model. This established a hopeless antagonism between the advocates of the creole-mestizo project, consciously formed, and the unformulated forces proceding from the nature of the society. This situation was rendered more unfortunate by the absence of the spirit of compromise, which was in a large measure due to the influence of the church. In its assumption of transcendental wisdom, the church was necessarily disposed to regard its view, whether of things divine or human, as the absolute truth. Long merged in the state, and having become an important element in the society of the colonies and of the independent nations that succeeded them, it transmitted more or less of its uncompromising disposition to all of the participants in political life. It thus tended to vitiate or destroy the attitude of mind presumed in a deliberative assembly or in a government involving many persons of different opinions. Liberal government has been successful only where the clash of divergent ideas and interests has been attended by a willingness to yield a point when necessary to effect an agreement. But in so far as the church communicated its spirit to the politics of Spanish America, it made parties uncompromising, and tended to cause conflicts of opinions to be followed by physical conflicts.

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The advocates of democracy entertained an ideal of government that had been successfully realized where there was a large measure of social equality, and where habits acquired by centuries of experience had ripened into a political instinct. Both of these conditions were wanting in Spanish America. There was no equality either in social standing or in material possessions, and the mass of the people had had no political experience whatsoever. Attempts to organize democratic governments were, therefore, destined to be crowned with very little success; and when democracy fails, its successor is not infrequently absolute monarchy. Thus, during the early decades of the independent Spanish-American states, there was in some sense an alternation of representative government and dictatorial rule. The fact that all of the independent states on the American continent had a revolutionary origin removed from the irregular beginnings of these governments any stigma they might have had, if the people had not shortly before resorted to usurpation in establishing their political independence. These short-lived governments provoked opposition not by reason of their irregular origin, but because they failed to perform governmental functions in a satisfactory manner, or because their purposes were disapproved. Opinions honestly held concerning dictators, even by members of an enlightened nation, are determined less by the illegality of their assumption of power than by the purposes of the governments which they establish.

But out of the disturbed state of affairs, which succeeded the war for Spanish-American independence, three typical forms of government have been evolved, represented by the aristocratic, or oligarchic, government of Chile, by the dictatorship, which has appeared in several countries, and by the representative governments of Peru and the Argentine Republic. The period of confusion was shorter in Chile than in most of the other states. The Chileans very early found a form of government adapted to the nature of their society. The sole social element that could dominate the country, was the aristocracy of the capital. This was not only the most cultivated and enlightened part of the population; it was at the same time the richest. The members

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of this aristocracy had vast territorial possessions, and over the common people who depended upon these estates for their livelihood, they exercised a control not greatly unlike the rule of the medieval feudal lord. They were enabled by means of these estates to exert a powerful influence in every part of the country. They had, it is true, little experience in the affairs of government; but their cultivation and their experience in the management of property gave them a two-fold advantage over the larger part of the Chilean people, who were entirely illiterate and for generations had been subordinated to masters.

The prestige of military leaders and their reluctance to give up their positions of supreme control constituted an important hindrance to the establishment of civil government in Chile. Here, as in many other cases, the officers of the army were disposed to continue in power, when the circumstances no longer demanded the exercise of military authority. But the experience of ten years showed clearly to the cultivated minority of the nation, that the arbitrary power of a military officer did not furnish a sufficiently stable basis for a permanent government. Moreover, the ignorance of the bulk of the population, and the absence of provincial autonomy rendered unsuccessful the attempt to create a liberal federal republic. In order to put an end to the political and administrative confusion, there was needed, in the first place, a party embracing the instructed and controlling elements of the various communities, and competent to make its power recognized throughout the country; and, in the second place, a president responsible to this party, but with sufficient authority to enable him to act promptly and effectively. The idea of a government embodying provisions like these found expression in the constitution of 1833. Besides a president with extensive powers, there was a congress elected under a restricted suffrage, which excluded the large uninstructed class from participation in governmental affairs. The fundamental purpose of the new organization was to provide a head of the state, who would be efficient but responsible to a strong party; in other words, to confer upon the aristocracy the power to govern the country, and thus avoid, on the one hand, the evils of an irrespon-

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sible dictator, and, on the other hand, the equally dreaded evils of an ignorant and undisciplined democracy.

The aristocracy recognized by this constitution was not limited by birth or official appointment, but embraced the enlightened part of the population, and might be increased as cultivation was extended. Under its domination, the suffrage was not regarded as a remedy for curing class ignorance, but as a means for providing an administration that would preserve order, afford protection to life and property, and furnish conditions favorable for the development of the material and intellectual interests of the nation. Resting on the instructed and conservative part of the inhabitants, this government has avoided the selfish tyranny of dictatorial rule and the caprices of an ignorant populace. Its superior stability and efficiency as compared with other governments created in Spanish America under similar social conditions suggest its adaptability to any society that has assumed a form comparable with that of Chile.

The frequent appearance of the dictator in the Spanish-American states has been facilitated by the failure of the cultivated part of the inhabitants to form a party competent to dominate the country in question. This failure has been due to various causes: to the lack of experience in government; to the absence of political toleration; to want of a compromising spirit; and to the suspicion with which the individual members of the several communities have been accustomed to regard one another. Chile, in this respect, was more fortunate than the other nations; for, in facing the hostility of the Araucanians throughout the greater part of the colonial period, they had been, to a certain extent, compelled to act in concert. But most of the inhabitants of the towns or principal groups in other countries, by reason of the isolation in which they lived, became divided into antagonistic factions, and consequently incapable of forming a party sufficiently powerful to thwart the designs of a dictator.

The Spanish-American dictatorships are practical illustrations of the government described by Machiavelli in *The Prince*. This famous book is not to be taken as a recommendation by the author, in which are stated his moral preferences, but rather as

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the solution of a problem: Given an absolute prince, or ruler, what conduct is consistent with, or required for, the maintenance of his rule? Machiavelli recognized other forms of government as better than this, but if one would rule absolutely, the course described by him must be pursued, and the conclusions involving the acts specified are generalizations from the facts of absolute government as it had appeared prior to the sixteenth century; and the history of absolute government since he wrote has in no way controverted his conclusions. It was, in general, small states that presented Machiavelli's data, and the small states of Spanish America under dictators furnish the most perfect illustrations of his doctrines. The rule of Dr. Francia in Paraguay (1817–1840) was so completely in harmony with these doctrines that one might be disposed to think *The Prince* had been his political guide.

But the Spanish-American dictators were less directed by written prescriptions than by an instinctive appreciation of the acts required in the execution of their plans. Their courses of conduct were not the same in all cases, but the variation was determined by the different personal characters of the dictators and their different environments. The cold, calculating ascetic of Paraguay could not be expected to act in the same manner as the laborious and impulsive Rosas of the Argentine Republic, or the brutal Huerta of Mexico. Yet, by whatever means they have attained absolute power, or under whatever circumstances they have ruled, the results of their reigns have, in a measure, common characteristics. The most striking of these characteristics is a certain national deterioration, the extent or permanence of which naturally holds some relation to the length of the reign in question. Although Francia was made dictator for life in 1817, he had been the controlling figure in Paraguayan affairs during the previous six years, having been the leading member of the governmental *junta*, or commission, organized in 1811, and dictator for three years from 1814. Thus, for more than twenty years, he held Paraguay isolated from the rest of the world, practically without foreign commerce, and without immigration or emigration.

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The large Indian element in the population of Paraguay made retrogression under the isolation imposed by Francia inevitable; and the tyranny of the dictator predisposed the inhabitants to be led like unreasoning cattle by Francia's successors, Calos Antonio and Francisco Solano Lopez. The second Lopez, carrying out the dictatorial policy of his predecessors, and moved by an insane ambition to play the rôle of a great conqueror in South America, plunged recklessly into a war with Brazil, Uruguay, and the Argentine Republic, during which the larger part of the population of Paraguay disappeared.

In the Argentine Republic, Rosas' fierce persecution (1835–52) drove many of the nation's most enlightened men into exile. Taking refuge in Montevideo and Santiago de Chile, they gave an intellectual impulse to life in those cities; and Buenos Aires not only lost for the time being its men of greatest promise, but the inhabitants, terrorized by the dictator's system of spies, became suspicious of one another, and the hopeful prospects of progress were for a period obscured under the influence of a brutalizing tyranny.

The increased promptness and efficiency of the government that has passed into the hands of a dictator, who is not obliged to consult a ministry or a parliament, sometimes evokes eulogies before his course is entirely run, or the results of his government are fully appreciated. This was the attitude assumed by many persons with respect to the administration of Porfirio Diaz, lately dictator of Mexico. The material development of the nation was seen, but it was not always appreciated that this economic growth was largely a contribution to the wealth of other nations; and the spiritual decay passed entirely unobserved.

In Chile, political power rested in the hands of a cultivated minority of the nation, but within this minority, there was movement, free discussion, and, among those practically enjoying political rights, a general eligibility to office. One president followed another in legitimate succession within the political class, personal rivalry and the possibility of acquiring positions of influence and power facilitated an active interchange of ideas and the maintenance of a normal political life. A step towards

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this end had been taken in Mexico by a constitutional provision that no president was eligible for the term succeeding that of his incumbency. But Diaz caused this provision to be annulled by an amendment of the constitution, and subsequently ruled without interruption, until overthrown by the Madero revolution.

The generation that grew up in Mexico during the reign of Diaz, reached maturity without acquiring any sense of independent political power. There was no party, either large or small, to whom Diaz was responsible. There was no independent organization of the Mexican people or of any part of them, on which the government rested. The Mexican people as a vital political body had ceased to exist. Underneath a network of offices depending on the will of one man, there was social chaos. Diaz had destroyed the moral life of the nation; and when he was removed it became evident that the official structure, which he had created, had no more foundation than the crust of cooled lava over seething volcanic fires.

When the morale of a nation has thus been destroyed, or its development prevented, a national revival, or a popular regeneration, cannot be effected by a decree or by the adoption of a law. It is not the law which determines what the form and character of a society shall be, but the form and character of a society which determine what laws shall have vital force and be executed. Among the inhabitants of the United States, there are many intelligent persons whose experience and practical knowledge of social conditions are limited to the affairs of their own country; and they very naturally entertain the opinion that the democratic institutions which were developed in the colonies contained in themselves a regenerating force and that other nations would have a fortunate political experience similar to that of the United States, if laws framed in accordance with democratic principles were adopted by them. But it is idle to suppose that a chaotic state of political demoralization, like that into which Mexico has fallen, can be transformed into a condition of order and enlightenment by the simple means of a democratic election. An ignorant and brutalized majority, even when empowered to express its views by the ballot, is not competent to accomplish

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the spiritual regeneration, which must attend the rise, in that unfortunate country, of a beneficent and stable government.

Peace, prosperity, and good government for Mexicans do not lie in that direction. The population of Mexico is not democratic. It embraces a limited number of men of distinguished attainments, a considerable body of cultivated and enlightened persons; but the majority, the bulk, of the nation is composed of illiterate Indians and mestizos. With respect to its general character, this population is similar to that of Chile, and the governmental policy under which the Chileans have had a comparatively fortunate political existence offers the most hopeful suggestion for Mexico; in fact, the tragedy of these last years would probably have been avoided, if Diaz, thirty years ago, had been sufficiently patriotic, or unselfish enough, to unite with the leading Mexicans in forming a combination of the cultivated men of his country for the purpose of controlling the government; if, in other words he had coöperated with the more enlightened members of the nation in forming a strong party, whom the president should regard as his constituents, and used his influence to cause the presidential office to be held by a series of competent persons in succession.

This suggestion is not in harmony with the views of those persons who consider the extension of the suffrage as the sovereign remedy for all national ills; still the only practicable government for any Spanish-American state, under the present condition of the inhabitants, is either an aristocratic government or a dictatorship. Even the well-ordered governments of Peru and the Argentine Republic are nominally broadly representative, but practically only a small part of the citizens of these countries exercise political rights freely. The end aimed at in some districts in the southern part of the United States, has already been reached in both Peru and the Argentine Republic: persons entitled by law to vote are prevented from exercising this right. In this way, representative governments, which, according to the constitution rest on a democratic basis, are transformed into aristocracies or oligarchies, in spite of the law.

Although the Spanish-American nations have certain similar

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features, they have at the same time important fundamental differences. These differences refer to two principal causes. One of these causes is the varying physical environment. Almost every known kind of soil and climate is found between the nothern lands of Mexico and the southern end of the continent; and this variation of environment has already exerted, and is still destined to exert, a powerful influence in the development of diversified national types. The differences observed will be increased from generation to generation by continued subjection to the forces of varied physical conditions.

Another cause of national diversity is the unlike popular elements that have united with the Spaniards to form the body of the common people. The union of the hardy and fierce Araucanian with the Spaniard, to take a single example, has made the common man in Chile very different from the Peruvian, in whom the blood of the Spaniard is mingled with the blood of the more gentle and subservient Inca Indian. And the divergence is even more marked in so far as the Indians of pure blood have been adopted and become members of the respective nations. This national divergence, in the course of time, will be further increased by European immigration in some cases and the lack of it in others. In the Argentine Republic, for example, through abundant immigration, the national type is becoming more and more completely European, and the continuance of this process will tend gradually to eliminate the Indian blood. In some other countries, however, like Bolivia, not attractive as places of residence for Europeans, the national type will become more thoroughly assimilated to that of the Indians. And this differentiation of the nations will necessarily bring about a differentiation of governments; but, while these governments of the future may possibly depart from any form now adaptable to conditions in Spanish America, their qualities cannot be clearly discerned by any political prophet of the present.

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THE REMOVAL OF JUDGES BY LEGISLATIVE ADDRESS IN MASSACHUSETTS

LOUIS A. FROTHINGHAM

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While there are many noteworthy and liberal provisions in the constitution of Massachusetts, there is one of particular interest, especially at the present time, because of the wide discussion accorded the subject with which it deals. This is a provision relating to the removal of judges, and declares that a judge of any court in Massachusetts may be removed by the governor and council on an address of the legislature. When Colonel Roosevelt said in his famous speech before the Ohio Constitutional Convention at Columbus, in speaking of the recall of judges, that he favored such a drastic method of removal as was embodied in the Massachusetts constitution, many people opened their eyes in amazement. Few, of course, had ever heard of removal by address, and fewer still, if they had heard of it, understood what was meant. Their surprise was entirely natural inasmuch as no case of removal by address has taken place in Massachusetts for more than a generation.

Constitutions are generally supposed to be dull things, and not many people read them even in these times of unremitting attack on their provisions. That is why so few have realized that in the old Bay State there exists a most effective and unusually liberal system for the speedy removal of judges. Many of the States of the Union provide for removal by address, but practically all stipulate that a two-thirds vote of both the house and the senate is necessary in order to remove the judge. This makes removal very difficult. In the State of Washington three-fourths of the members of each house must concur; but in Massachusetts a mere majority vote is sufficient. In most States the cause for removal must be stated; notice must be served on the accused and a hear-

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ing must be given; but under the requirements of the Massachusetts constitution no reason need be assigned and no hearing is necessary.

Most States of the Union have superseded their original constitutions by at least one, and in the majority of cases by several new documents, each one growing longer and containing provisions relating to an increasing number of new subjects. Massachusetts, almost alone, is living under her original constitution, adopted in 1780. To be sure, she was the last of the original thirteen States to adopt a constitution, but she has held to it consistently. This has been possible because of the provision for easy amendment and because of some very broad enactments in the original document. It is not because Massachusetts is behind the times, but because the originators of the constitution were far-seeing enough to draw up a liberal and elastic document. Hers, it will be recalled, was the first constitution submitted for ratification to the vote of the people. Since 1780 it has been forty-three times amended. Two constitutional conventions have been held since that date: the people accepted nine of the fourteen amendments suggested by the convention of 1820, and rejected the entire new constitution and seven other propositions referred to them by the convention of 1853.

An attempt was made by the convention of 1820 to make the removal of judges by address more difficult. In the first place it was proposed to require a two-thirds vote of each branch of the legislature instead of a majority, and the committee of the convention which had this matter in charge reported accordingly. The report was rejected, however, by the convention.

Daniel Webster, in speaking of this subject before the convention, assumed that removal could take place without trial or accusation. He said: "If the judges, in fact, hold their office only so long as the legislature sees fit, then it is vain and illusory to say that the judges are independent men incapable of being influenced by hope or by fear; but the tenure of their office is not independent. The general theory and principle of the government is broken in upon by giving the legislature this power. The departments of government are not equal, coördinate and inde-

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pendent while one is thus at the mercy of the others. What would be said of a proposition to authorize the governor or judges to remove a senator or member of the house of representatives from office?" Lemuel Shaw, afterwards chief justice of Massachusetts, said in addressing the convention: "By the constitution as it stands, the judges hold their offices at the will of the majority of the legislature."

After much debate an amendment was adopted by the convention requiring that the cause assigned for the removal of any judge should be placed on record in the branch where the action originated, and that notice should be served on the accused person in order that he might have an opportunity to be heard. This amendment was submitted to the people in the same article with a provision to strike from the constitution the clause giving the governor and the two houses of the legislature the right to ask, upon important questions of law and on solemn occasions, the opinion of the judges of the supreme judicial court. The people rejected the article. Possibly if these two suggestions had not been put together, but had been divided so that one might have been accepted or rejected without the other, the vote would have been different.

There has been a good deal of dispute as to whether this clause of the Massachusetts constitution, which provides for removal of judges by address, went any further than to cover removal for incapacity. It was because of incapacity that Judge Bradbury was removed by address in 1803. He had become enfeebled by age and unfit to do his work. We have noted the statements made by leading lawyers, such as Daniel Webster and Chief Justice Shaw in the convention of 1820, and the general assumption that removal could be made for any whim. In view of this, and in the light of the actual experience of the commonwealth in the matter of removal by address, there seems no doubt that at present a judicial removal can be made for any cause, or for no cause.

Let us glance at some of the cases which have arisen in Massachusetts. There have been a number of them. Besides Mr. Justice Bradbury two judges of the court of common pleas were

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removed by address in 1803 for extortion in office, and two justices of the peace were removed in 1876. The most famous cases, however, are those of Mr. Loring, judge of the probate court for the County of Suffolk, and of Mr. Day, judge of the probate court for the County of Barnstable. In both these cases hearings were given, but only because this was a general custom. The course of procedure followed the usual method governing legislation. A petition was introduced for the removal of the judges. The petition was referred to a committee—in the Loring case to the committee on federal relations, and in the Day case to a special committee. These committees then sat and heard the evidence for and against removal, together with the arguments of counsel; after which in due time they reported to the legislature. This report, of course, had to be acted upon by both house and senate. If the committees favored removal they said so at the end of their reports; then they further recommended that a joint committee, consisting of two members from the senate and five from the house, be appointed to present the address to the governor. Full reasons for the removal were given in the report of the committee, and dissenters were allowed to file a report of their own. When the house and the senate adopted the report, the address was taken by this special committee to the governor. In the case of Judge Loring the address read as follows: "The two branches of the legislature in general court assembled respectfully request that your Excellency would be pleased by and with the advice and consent of the council to remove Edward Greeley Loring from the office of judge of the probate court for the County of Suffolk." When the address went to the governor, therefore, it consisted merely of a request for removal of the judge, and did not state any reasons as did the report of the legislative committee. The governor, after the receipt of the address, presents the question of removal to the council, and if the council and the governor favor it the latter issues a writ of removal, sending a message to the legislature to inform them of the fact that removal has taken place.

These two cases came up in successive years. Judge Loring was not only judge of probate, but held also a commission from

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the federal government as United States commissioner. In the latter capacity he signed a warrant for the rendition of Anthony Burns. This act created a furor; the legislature was appealed to; long hearings were held at which distinguished counsel represented both sides; and the two houses voted an address to the governor and council. Governor Gardner, however, sent back a message to the legislature refusing to remove Judge Loring, and during the remainder of this governor's term no further address was sent to him. But in 1858, on Governor Banks taking office, the legislature sent an address to him requesting the removal of Judge Loring as judge of probate. The new governor acceded to the request, on the ground that the legislature had passed an act declaring that no person should be both a Massachusetts judge and a United States commissioner. No reasons were assigned in either of the addresses, but in their messages both Governor Gardner and Governor Banks gave their reasons—in one, of the causes for not removing, and in the other for removing the judge.

In the case of Mr. Day several hearings were held, and all the accusations against him were thoroughly investigated. In 1881, the first time the case came up, the committee reported against removing Judge Day and their report was sustained by the legislature. In 1882 a committee voted in favor of removal, both houses voted for removal, and the governor removed him accordingly. No reasons were given by the legislature in their address to the governor and none were given by him in acceding to the request. Even as late as this case a petition was signed by leading members of the bar asking that the opinion of the supreme court be requested as to the right of removal by address for any cause except mental or physical incapacity. This suggestion, however, was not acted upon. Whatever the intention of the framers of the constitution may have been, there seems no doubt from the language used, which is without limitation, that removal by address is quite unrestricted.

Let us now glance for a moment at the factors surrounding the making of the Massachusetts constitution. The constitutional convention of 1779 met in Cambridge in the old church near where Dane Hall now stands. A committee of thirty was chosen to draft a constitution. This committee appointed a sub-com-

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mittee of three, and the sub-committee of three—consisting of James Bowdoin, Samuel Adams, and John Adams—left the drafting of the document to John Adams. The constitution as adopted was, with some changes, his handiwork. In his voluminous works, though he speaks in detail of many of the sections, he throws no light on the particular provision for removal of judges by address. That clause, like many others, was taken from the British system of government, where, out of the original power of the king to remove judges, there developed the provision in the Act of Settlement that they could be removed by the king on address made to him by parliament. No hearing was provided for and no restriction was placed on the cause of removal. The power of the king to remove judges arbitrarily and alone was taken from him—that was all. As in Great Britain a hearing has been usual on petitions for removal by address, so in Massachusetts the people's sense of justice and their demand for fair play will always guarantee the accused a proper hearing. Judicial removals both in England and in America have been far from numerous. Where a serious offense is alleged, impeachment is the logical procedure. But so far as precedent goes in either country, any cause may be alleged (not alone disability) to justify removal by address.

Because the judges in Massachusetts have so seldom abused their power; because the people feel that they are so invariably men of uprightness and great learning; because they know that only through stability and security of tenure of office, regardless of fear of political cliques and parties, can justice be maintained; because of the liberal method for removing judges provided in its constitution, there has not been, nor do I think there is today, any great popular demand either for the recall of judges or of judicial decisions in that commonwealth. Strange to say, it has been in states where judges are elected that the complaints against their decisions have arisen. Goodness knows there have been too many examples of the viciousness of this policy of having judges dependent for their positions on the bidding of political chiefs to want to take the risk of extending the system! A very fair solution of our nation-wide problems in this regard might be had by the extension of the Massachusetts provision to other States.

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SOME NEGLECTED FACTORS IN LAW-MAKING[1]

ERNEST BRUNCKEN

Library of Congress

An obscure member of a legislative body dictates to his stenographer a document called a bill and submits it to the legislature. The bill goes through all the various stages provided, receives on its way more or less desultory discussion, mostly of an *ex parte* character, is adopted by a legislature, of whose members a majority have but the slightest, if any, acquaintance with its contents; is signed by the governor, and now has become a part of the law of the land.

In some law report, I find that a learned and famous judge, speaking on behalf of his brethren of the bench, with whom he has first consulted, enunciates a certain unfamiliar rule as being the law of the land. The court has come to this conclusion, not hastily nor without a serious attempt to understand the rule in all its possible bearings, but after careful study, assisted by the written and oral arguments of able counsel, who on their part have made an elaborate and profound study of the question, from differing points of view. Moreover, the question had already been considered, with hardly less thoroughness, in the court from which the case was appealed. The rule which is the outcome of so much intense labor of a number of trained intellects is not, avowedly, a new law. The convenient theory is that it has been the law all along, but had never been formally announced because no case involving it had come up for judicial determination. But notwithstanding this formal theory, most political scientists would agree that in reality the new rule was a piece of judicial legislation. Yet, as I try to discover why this new law was enunciated by the court, I find that the precise rule is indeed a

[1] A paper read at the tenth annual meeting of the American Political Science Association.

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new one, but that it has a long ancestry of precedents, dealing with somewhat similar matter, and is merely a comparatively slight modification of old principles, which for many generations have been the law without a trace of dissent. It may be that its germinative principle was already old when the oldest of the Yearbooks was written, or if it be in those fields of our jurisprudence more abundantly fertilized by the Roman law, it may be recognized in the XII tables.

But this carefully nurtured child of the best line of juristic thinking, and the hasty product of our legislative machinery are, in the accepted legal theory, of precisely the same value and effect. Both are the law of the land, to be observed and obeyed by all good citizens.

Yet, one can hardly doubt that there is a difference between the two. What that difference is, and how a newly-made statute may gradually enter into the same category with the long-established common law or equity rule, until the difference has disappeared, is to be the subject of this paper.

Somewhere in the *Corpus juris civilis* I found the sentence: "*Non ex regula jus sumatur, sed ex jure quod est regula fit*—The law is not to be gathered from rules, but the rules grow out of the existing law." And the distinguished president of Yale, speaking of the true character of our constitution, puts a similar thought into a striking metaphor when he says:[2] "A fence does not make a boundary—it marks it. . . . . The constitution is the evidence of a limitation, not the cause." Both sentences, the one referring to the body of the unwritten, the other to a written law, express the same idea: That the mere enactment of a statute, or the enunciation of a rule by a court, is not of itself sufficient to make law in any true sense. Of itself, it is merely what I should like to call nominal law. It will not be true or essential law until it has proven itself to be founded upon the sense of right generally prevailing in the community, or, to use the words of Isidore of Sevilla, until it is seen to be "*secundum naturam, secundum consue-*

[2] Hadley, *Freedom and Responsibility*, p. 30.

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tudinem patriae, loco temporique conveniens"[3]—"in accordance with human nature, in accordance with the settled habits of the people, fit for the place and the time." As long as it lacks these qualities, it may indeed be enforced for a while by courts and executive officers, but it is certain, within no distant period, to be repealed, to become disregarded and obsolete, or to be modified by judicial interpretation and construction until it has been brought into conformity with the requirements of essential law.

These alternatives in the history of a new law are the first of the factors in the process of law-making to which I desire to call your attention. The second factor is even more important. It is concealed behind the conspicuous but comparatively superficial aspects of legislative and judicial proceedings, but in the long run determines the result of these activities. This factor is the influence of the ideas, the habits of thought, feeling and action generally prevailing among the people, an influence no less potent in determining what statutes the legislature will adopt than what manner of interpretation the law shall find in the courts.

It seems as if anybody capable of entering through the husk into the kernel of juristic concepts must see that there is an essential difference between an old-established rule, in accordance with which the affairs of society have been carried on for generations, and a newly adopted statute which may never be actually enforced and be repealed at the next session. Clearly, such a statute, while in form a rule of general application, lacks one of the principal characteristics of a true law: Permanence. In its short life, and the few cases in which it is actually applied, it rather suggests the nature of a mere command. Laws of this imperfect nature are by no means peculiar to our own country. At various periods in legal history, there have been epidemics of a mania for making multitudinous laws without force or stability.

[3] The whole passage from which these words are taken might well be emblazoned on the walls of every legislative chamber: "*Erit lex honesta, justa, possibilis, secundum naturam, secundum patriae consuetudinem, loco temporique conveniens, necessaria, utilis, manifesta quoque ne aliquid per obscuritatem in captionem contineat, nullo privato commodo sed pro communi civium utilitate scripta.*" S. Isidorus Hispalensis, *Etymologiarum*, Liber V., cap. 21. Migne, *Patrologia Latina*, vol. 82.

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Tacitus complains of it in the Rome of his days.[4] The period of absolutist governments on the European continent, fruitful as it was in most admirable examples of statute making, was also noted for the fitful instability of much of its legislation. In one German principality it became a proverb that "storms from the East and laws from Bayreuth last three days." And long before the days of imperial Rome even, Aristotle had said: "Law derives its authority from nothing but custom, and this grows only in the course of a long time, so that an easy changing from existing laws to different and new ones is to weaken the force of law."[5]

In fact, it may be said that all newly-made statutes are at first merely nominal law, and it requires a further process of growth, adaptation to the actual conditions of society, and confirmation by tacit consent of the members of the community, before they can attain the rank of essential law. "All law," says Professor Jellinek,[6] "has at first an ideal existence only, represents an 'Ought' which may be contradicted by reality; it intends to regulate human acts, and therefore the possibility of its violation is normally implied in its conception." This fact however, that a new law is at first merely an ideal, to which reality may or may not conform, is very often neglected. Again and again we may observe how well-meaning but unwise people believe that they have accomplished a great reform when they have got the legislature to pass a statute, unmindful of the probabilities of its enforcement. Such laws are often mere attempts on the part of a minority, perhaps a very small minority, to impose their own standards of morality upon a community in which entirely different standards prevail. Of this kind are prohibition laws in places where drinking habits are well established; excessively strict laws against sexual vice, and prohibitory gaming laws where the gambling and betting passion is strongly developed. It is possible, to be sure, that a law of this kind may continue in nomi-

[4] *Corruptissima republica plurimae leges.*" *Annales*, iii, 27.

[5] "Ὁ γὰρ νόμος ἰσχὺν οὐδεμίαν ἔχει πρὸς τὸ πειθέσθαι παρὰ τὸ ἔθος, τοῦτο δ' οὐ γίνεται εἰ μὴ διὰ χρόνου πλῆθος, ὥστε τὸ ῥαδίως μεταβάλλειν ἐκ τῶν ὑπαρχόντων νόμων εἰς ἑτέρους νόμους καινοὺς ἀσθενῆ ποιεῖν ἐστι τὴν τοῦ νόμου δύναμιν." Politics, ii, 8 (1269a).

[6] *Staatenverbindungen*, p. 9.

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nal force long enough to allow the popular standard to grow up to it. It may then have an educative influence, and although the individual cases of enforcement may widely be felt as tyrannical and unjust, its very existence may tend to convince the public gradually of its wisdom. Such a process seems to be going on before our eyes today in regard to laws against setting fires in the woods. Far oftener, however, instead of ripening gradually into essential law, such statutes are eliminated in the course of time by one of the three processes already mentioned: repeal; obsolescence; and destructive interpretation by the courts.

Of these three, repeal is obviously the simplest and most straightforward. We all know how commonly statutes passed by an American state legislature are repealed at the next session or the session after that. It might be an interesting subject for a doctor's dissertation, to collect statistics, how many statutes were repealed, in the various States, within ten years after enactment, leaving out of account all cases where the repeal was merely for the purpose of reënacting an amended statute of substantially the same nature. I believe the number of such abortive enactments will be found astonishingly large, and in a majority of cases it will be clear that the repealed law was an attempt to set up some ideal not approved by the deliberate sense of the community, and often representing nothing but the crotchets of a small group of enthusiasts or even a single individual. The inefficient business methods of our legislative bodies make such attempts much easier in this country than anywhere else.

The second method of getting rid of mere nominal law is also applied commonly enough. It is that of tacitly disregarding it, until it has become so obsolete that at a favorable opportunity it is quietly repealed by common consent. Quite differently from the class of penal statutes mentioned above, these laws are usually considered harmless in themselves, so that nobody takes any particular trouble to have them abolished. Our statute books are full of them. Thus, many states provide a short form of deed for the conveyance of estates in land, with all the effect of the traditional forms. In many places, however, this convenient method is practically never used by conveyancers, because they feel, and

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rightly so, that the public distrusts and dislikes it. In Wisconsin until the latest revision of the general statutes there was a provision in the law regulating apprentices, according to which the master must give his apprentice, at the end of the term of indenture, a new Bible. The system of indentured apprentices is by no means extinct; in fact, it has experienced a sort of recrudescence, of recent years, in some of the most important industries. Yet it may be doubted whether a single "new Bible" has ever been given under the law.

Another form of abortion in the case of statutes occurs perhaps even more frequently. That is where lawyers, and laymen under their advice, decline to make use of some statutory permission because of a well-grounded fear that it will be held unconstitutional. This test is, of course, confined to the United States (also Australia and, in a modified sense, Canada and South Africa); but even in England the courts will on proper occasion declare that a statute is not really law, because it has never been enforced. In Rex vs. Kennedy (86 L. T. Rep.), a magistrate had refused to entertain a petition, under the penal clauses of the Catholic relief act of 1829, against a man who had joined the Jesuit Order. The court sustained the magistrate. Alverston, C. J., put his decision on the ground that the court below had exercised a proper discretion in holding that the clause banishing a person entering this order from the realm was obsolete; and Darling, J., agreeing, cited the unreported case of one Payne,[7] in which Chief Justice Mansfield refused a writ of *qui tam* against a "Popish recusant," saying that the anti-Catholic statutes "were never intended to be enforced at all, but were made *in terrorem*."

We can see, then, that the courts are quite willing to help the public in exercising a censorship over the raw product of the legislatures, to carry along the process of weeding out the unfit portions of nominal law and developing the rest into essential law. They do this, not merely by declaring statutes unconstitutional or obsolete, but even more commonly by a process of interpretation

[7] See Holiday's *Life of Lord Mansfield*, p. 179. For additional cases in which acts of parliament have been held void: Dr. Bonham's case, 8 Coke, 118; Day vs. Savage, Hob. 87; City of London vs. Wood, 12 Mod. R. 687.

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or construction. We are all aware what a large body of reported cases there is dealing with the proper principles of these two operations, but it might be another fertile subject for an industrious candidate for a doctor's degree, to collect the various statutes in his own state, which have undergone this process, and to show how that which the courts, in accordance with established rules, find to be the true intention of the legislature differs from that which the members of the legislative body and the outside public thought they intended. Every lawyer will recollect instances of this character—I may cite here but one that happens to have achieved recently a particular notoriety, the federal Sherman act with the "Rule of Reason" interpolated into it by the Supreme Court.

There are, to be sure, able political thinkers who disapprove of this power of censorship and revision which the courts have exercised from time immemorial. Their view is found in the works of Bentham (*Fragment on Government*, iv, sect. 32), where we read: "Give to the judges power of annulling (acts of parliament), and you transfer a portion of the supreme power from an assembly which the people have had some share, at least, in choosing, to a set of men in the choice of whom they have not the least imaginable share." If we agree with the great Philosophical Radical in the assumption that all political power is derived from the people—and in some form or other practically all of us assent to that—we can still see plainly that he erred in the belief that the only way in which the people can express their will is by representatives formally elected. Since Bentham's time we have added over a hundred years of representative government, far more widely spread over the globe and assuming forms far more in agreement with his principles than the unreformed parliament of his time. One of the things we have learned during that period is that elected representatives may be very far from representing the true, deliberate will of their constituents. They may represent a passing phase of popular emotion or delusion. They may stand for nothing but the ambitions, legitimate or otherwise, of individuals. They may be the expression—some would say they are normally the expression—of special social or economic inter-

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ests, instead of the commonwealth, and especially of whatever special interest is at any time dominant in the nation. Thus we have lost a large part of the trust people used to feel in elected assemblies, and we are ready to ask whether the popular will may not be ascertained in some other and more reliable way.

This brings us close to the second factor in legislation—the influence of underlying popular beliefs and desires. But before we consider this subject, I may be permitted to offer a bit of advice to those who dislike the activity of the courts in revising our nominal law. They might forestall the greater part of all this judicial work by promoting better work on the part of the legislatures. If all statutes, before being adopted, were skillfully drawn by trained draughtsmen; if the present anarchy in our legislative bodies could give way to responsible leadership, so as to make a consistent policy feasible at least within each legislative session; and if lawyers, and other men in positions of influence, had some knowledge of the theory of legislation, there would be very little need for censorship by the courts. It might even be possible to imbue the public, by slow degrees, with some elementary insight into the proper purpose of legislation, so that there would be an end of the ever-recurrent attempts to make men moral by meddlesome restrictions. There might be a great improvement, if every legislator were taught to leave something to moral influences and to pass penal laws only against the graver evils, those which were described centuries ago by Thomas de Aquinas as faults "*a quibus possibile est majorem partem multitudinis abstinere, ... et sine quorum prohibitione societas humana conservari non posset.*"[8]

Now to come to the proposition that legislation is determined by the condition of public feeling. The entire process of censorship and revision, of which we have just spoken, is itself an illustration of this doctrine, for it means simply that statutes not in accord with the public sense of right and justice must be brought into such accord, or else remain unenforced. It is not, however, merely the development of statutes, and other nominal law, into essential law that is determined by the common sense of the com-

[8] *Summa theologiae*, Pars ii, *quaestio* 96, art. 2.

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munity; even the original adoption of the statutes, nay, their introduction, is so determined. The process of revision we have described is nothing but a method of remedying the imperfect action of public opinion which had already exercised its force on the legislatures. The ideal would be, that all bills introduced and all statutes passed should be adapted perfectly to the common sense of right. Then neither the courts nor the public would find anything to revise, and all law would be essential law. Such ideal perfection will never exist, because all law must be made through the instrumentality of individual men. However much these may be influenced by the surrounding public opinion, may act as its mouth pieces, nay, may even consciously strive to make themselves such, yet there is in every individual man something more or less singular, distinguishing him from all other men, that which we are wont to call his personality. This singularity cannot but have its influence on his legislative work. *Ex vi termini,* it is more or less in conflict with the common sense of right. If public opinion were unchanging, it would follow that everything in legislation that is derived from the singularity of individual legislators would be eliminated by the revising process; but it is notorious that the common sense of right is not unchanging. In some of its more superficial manifestations, in what we may call the opinion of the day, it is admittedly one of the most unstable, shifting, inconsistent things in the world; but even the deeper strata of the public consciousness, on which the growth of law more particularly depends, are in a constant flux. The individual legislator, whose singularity may at first make his newly adopted statute seem utterly out of accord with the common sense of right, may himself be a very important agent in changing the public mind, until it accepts fully what at first appeared to it unwise or unjust. Yet a certain amount of the irreconcilable singularities, possibly even of the crotchets and eccentricities, of individual legislators will remain in the result of a legislative session and require to be sloughed off in the process of revision.

In every man's nature there is this element of singularity in different proportions; one may assume that in any legislative body there is a greater proportion of it than would be found in

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an equal number of men taken at random from the outside public. For the very fact that they were elected to representative office shows that a certain element of personal superiority, of leadership, was somehow recognized in them by their constituents, and such superiority implies a degree of singularity. Yet the element of singularity must not be too great, for people will not accept as leaders men whose characteristics are alien to the masses. It follows, therefore, that notwithstanding the influence of the individual singular ideas, the personnel of representative bodies and the product of their legislative activities mirrors with fair accuracy the present state of public consciousness, and so it remains true, notwithstanding the influence of the personal singularities, that the result of legislative work is, on the whole, determined by popular feeling.

In our American state legislatures, and also in Congress, although there to a considerably less extent, it is usually difficult to see much consistency in the results of a session, or to discern a well-defined policy even in several successive sessions. Each piece of legislation stands by itself, for good or evil, and it happens not infrequently that at the same session statutes are adopted, built on principles that plainly contradict each other. The reason for this we all know well enough: the introduction of practically all bills by individual members, who become personally responsible for their passage or defeat; and the absence of an organized, responsible leadership, either emanating from the houses themselves, or coming from the executive branch of the government. Yet, if one takes *long* periods together, there will be found a certain family likeness between the legislative product, not only of statutes adopted but also of bills introduced in the various legislative sessions during such a period. Some of this similarity may be occasioned simply by the local and temporary needs, as where during the civil war period there was naturally a flood of bills dealing with military matters, or where in a newly organized state bills concerning the disposal of the state lands are abundant. After eliminating such similarities regarding the subject matter, there remains clearly a similarity traceable directly to the state of public opinion, reflected in the manner in which the representa-

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tives of the people are looking at public affairs. Until within a very recent time, American legislation naturally expressed the all but universal prevalence of individualism in economic and political matters: the leaving of economic activity to private enterprise with the least possible interference by government either in the way of promotion, or supervision and restriction. At the same time, there was little tendency to make the machinery of government more complicated than the simple conditions of colonial and frontier life had required. It is still a living sentiment throughout the community that the less there is of government the better. Nevertheless, differences may be traced in the manner in which these general principles were carried out in practice. Soon after the reforming zeal engendered by the struggle for independence had spent its force, there came the conflict between those in whom the French Revolution kindled a new enthusiasm and the conservative elements. Although the gallicanizing democracy of Mr. Jefferson gained the upper hand, thanks largely to the ineptitude of many of the Federalist leaders, the Jeffersonians, when they were actually in power, turned out to be surprisingly conservative in practice. Thus the time between the second war with England and the close of John Quincy Adams' administration is not conspicuous for sweeping legislative changes. With the advent of the backwoods democracy under Jackson a different condition arose. Now the public mind became eager to carry out the principles which the Jeffersonians had preached but by no means always practiced. The result was a flood of laws designed to sweep away what there was left of the old, prerevolutionary traditions still embodied in public institutions. Among the most conspicuous of the legislative reforms introduced in a large number of States from 1830 to the Civil War, were the adoption of the codes of procedure in New York, followed by similar enactments elsewhere, and the modifications of the law regarding the property rights of married women. During this period, the tendency also began to show itself of limiting the powers of the legislatures by various constitutional restrictions, a tendency which has since that time produced a large crop of both good and evil.

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A change of political movements from the individualistic direction towards a quasi-socialistic goal is a conspicuous phenomenon of the last third of the nineteenth century; it is a world-wide change but in the United States it began later than in most other countries. Its first faint traces may be discerned in the so-called Granger legislation of the seventies, but there were but few years of the nineteenth century left when it became at last a powerful influence in our public affairs. This movement shows itself in a flood of bills—within ten years or so a flood of actual statutes—designed to give to the government manifold powers of supervision and restraint, as well as promotion and aid, in the economic affairs of the country—powers which fifty years ago would have been universally deprecated and dreaded as subversive of the very essence of the American spirit. It is almost self-evident that these differences in the character of the bills introduced, as you look at the successive periods—and likewise their similarity during each period, although they are the products of so many different minds—reflect the changes of prevailing opinion going on among the people at large. No member of a legislature will ordinarily care to introduce and advocate a measure which he knows to be so foreign to the views and sentiments of his fellow legislators as to have no chance of adoption. In fact, this spirit of caution is apt to go so far that there is hesitation even after it is apparent to a clear-minded observer that the chances of adoption are by no means desperate. Consequently it is safe to say that the introduction of numerous bills of a certain character is of itself proof of a large body of favorable opinion among the public.

The same dependence, of even mere attempts at legislation, on public opinion is apparent also in the history of many movements for particular legislative changes. The movement for conservation of our natural resources may serve as an example. For many years isolated voices had called attention to the most conspicuous example of national waste, our treatment of the forests; but nobody cared to listen. In 1867, the Wisconsin legislature appointed a commission to look into the subject. The well-known early western naturalist, Increase Allen Lapham, wrote its report, in which the situation was discussed intelligently

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enough; but nobody dared to suggest any remedy beyond some inconsequential advice about "planting trees." More than ten years later, an attempt of the secretary of the interior, Carl Schurz, to stop timber-stealing on the public lands, aroused no less a personage than James G. Blaine, who understood nothing whatever about the subject, to pour all the vials of his sarcasm and rhetoric over the bold reformer. It was not until the last decade of the century, that any effective legislation was attempted, either in States or in the Union; and then public opinion was still so ill informed on the subject, that as absurd a measure could become law as the New York constitutional provision forbidding all utilization of the state forests. Not until the new century had begun, did the friends of a rational forest policy dare to propose really effective reforms, beyond futile tax exemptions and dead-letter fire laws. In the meantime, however, public opinion, although still listless enough, has arrived at the point where everybody agrees in theory that our forests ought to be properly managed, and even those whose selfish interests make them enemies of all conservation see fit to render lip homage to a proper system of forestry, professing themselves opposed only to any particular measure which at the moment happens to be under discussion.

The dependence of legislation, even under our disorganized methods, on the state of public opinion is apparent enough. But in order to show the true nature of the law-making process a qualification of this principle must be stated. The sort of public opinion which manages to be expressed in legislation is not always the public opinion prevailing throughout the community, but rather that of some class or special interest which at the moment is able to impose its wishes on the State, even though a majority of the public may at heart be opposed thereto. I do not refer at this point, to the temporary successes of schemers or fanatics who may take advantage of passing waves of popular excitement. I mean the more permanent domination of special groups of an economic or social character—a domination which not a few thinkers will declare to be the normal condition of society. This predominance of the opinion of a class over the more widely-spread opinion of the general community is a factor both of legislation

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proper and the subsequent process of interpretation and construction, for the majorities in legislative bodies as well as the bar and bench tend to recruit themselves from among the dominant groups. This factor may be either conservative or favorable to change according to the circumstances of each case. It is conservative perhaps most often where the predominant group is held together by a common economic interest. Thus we see at the present time quite generally still dominant, in the legislatures and in Congress, the classes which have an interest in maintaining the traditional standpoint of economic and political individualism; and presiding in many of our courts we find men who by training and association hold similar doctrines. Yet the evidence is strong that in the public at large very different views have already obtained a majority of adherents. In the nature of things it will take some years, however, before the representatives of the newer ideas, being probably mostly the younger men in the community, have risen to the positions of influence now held by their opponents. Where the special, dominating group stands for new ideas and sentiments, it will perhaps be found most often, that this is in the realm of moral questions. A clear illustration is afforded by our divorce laws. Most of the States include among the causes for divorce "cruel and inhuman treatment." The tendency of the courts has been, for a long time, to interpret these terms very liberally indeed, so as to make them include acts which may well be cruel if inflicted upon a person of the highest cultivation and refinement, but which are by no means felt to be so by the ordinary respectable but crude member of society. The application of opprobrious epithets has again and again been held to constitute cruelty that will justify a divorce; yet it is fair to say that among the great body of the laboring classes in this country, among whom most divorce actions arise, the calling of bad names, or sometimes even a blow, may indeed be resented as an offense and lead to a quarrel, but is felt by neither men nor women as making the continuance of the marital state unbearable. No doubt, it is felt to be such an unpardonable offense among the cultivated class to which lawyers may be presumed to belong, and where the parties are of this class a court is entirely right to

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grant decrees on such grounds. To apply the same standard indiscriminately to the domestic manners of laborers and other primitive folk, shows an incapacity to enter into the state of mind of people living under conditions different from one's own. Such stupid decisions can tend only to loosen still more the stability of the family relation, already exposed to so many assaults. No doubt it is to be desired that the higher conception of matrimonial conduct will gradually filter downward and permeate the entire community; but until that has been achieved, a premature and idealistic formulation of the law can work nothing but mischief.

Thus, by a silent process, easily overlooked by superficial observers, the formation of law proceeds, and mere nominal rules are gradually ripened into that essential law which may be said with truth to embody the deliberate and permanent will of the Commonwealth. The great principles of the common law, the roots of which are hidden in remote antiquity, constitute the core of this system. The great statutes of the Middle Age, such as those of "*quia emptores*" or "*de donis,*" so far as their subject matter has not become obsolete, have been worked into the permanent system so completely that we are no longer conscious, without antiquarian research, when we deal with the result of their principles, that strictly we are dealing with statutes and not with common law. Even much more recent statutes have already been completely assimilated to the original body. The statute of frauds, first enacted in the reign of Charles II, is still carried, in slightly modified forms, on the statute books of every American State; but when we study the enormous mass of case law gathered around it, we are quite apt to forget the precise text of the written law. Presumably, some of the statutes enacted in our own days will be practically forgotten by our successors, while the principles expressed in them will become part of the cherished inheritance of the American people.

If I have succeeded, in the brief time at my command in making my proposition clear, I have shown that the process of making law is not exclusively the work of legislative bodies, as the formal juridic theories would make us believe; nor even the work of the legislative combined with that of the judicatory organs of the

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state. The really determining factor is not the arbitrary will of individual men, nor even of groups of individual men acting consciously and with a deliberate purpose. The most important element in the entire process of law formation is that silent working of a million individual minds, each forming and expressing opinions, beliefs, feelings; setting up ideas, analyzing and judging the myriad facts and events of daily life; having all the time no conscious purpose of helping in any task of making laws, yet creating by their combined influence that environment which moulds the minds and shapes the purposes of those who at one time or other act in the capacity of legislators and judges. These silent forces have sometimes been called the folk-spirit, a term convenient and brief, yet one which will have to be used circumspectly by political scientists, on account of certain speculative and fanciful notions clustered around it. This folk-spirit is at work in the legislature as well as in the court, and the words applied to judicial decisions by an eminent American lawyer apply equally to the statutes: ". . . . . these . . . . . changes have usually been in accord with and due to the spirit of the age. The court really doing little more than registering the modifications of the national common consciousness. Hence these changes, in most cases, have passed unnoticed." I quote from Frederick R. Coudert, *Certainty and Justice*, p. 98.

To treat exhaustively of my subject would require a book dealing with practically every branch of political science. Nor do I imagine to have said anything that is substantially new; but I have tried to emphasize a phase of the theory of legislation which in the dust arising from the discussion of more superficial aspects is liable to become obscured.

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LEGISLATIVE NOTES AND REVIEWS[1]

EDITED BY JOHN A. LAPP

Director of the Bureau of Legislative Information of Indiana

Legislative Investigations: The making of laws on the basis of careful investigation of the conditions to be met and the remedies to be applied is being accomplished more and more each year by the authorization of special commissions to work between sessions and report their conclusions together usually with drafts of bills to be presented to the legislature, or by directing some administrative official or board to make such investigations and report.

The complexity of legislation and the rush of work which swamps a legislature renders some relief of this kind necessary. The States of Massachusetts and New York have long employed this method with great success and other States have rapidly copied the plan, particularly Wisconsin, where in recent years some of the most constructive legislation of these times has been the outcome of such investigations.

During 1913 more than a score of States have authorized investigations and fully seventy-five distinct subjects are now under inquiry in from one to a half dozen States.

The subject of agricultural credit is being reported on by a special commission in Ohio in connection with the federal commission. The same subject is being reported by state delegates from several different States. New York is revising its banking laws by a special commission. Indiana will have a report on "Blue Sky Laws;" Massachusetts, on the "Conditions and Education of the Blind;" Pennsylvania, on "Building Codes;" Ohio, on "The Feasibility of Leasing its Canals;" Illinois, and New Hampshire, on "Dependent and Neglected Children;" Penn-

[1] The aim of this Department of the REVIEW will hereafter be to furnish notes of legislation of special significance to political scientists, and annual reviews of legislation of a distinctively political science character. Such subjects as constitutional amendments, nomination and election of public officers, legislative processes including direct legislation, executive and administrative changes, judicial reform, and the relation of state to local government and to the federal government, will be emphasized.

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sylvania, on "Civil Service Laws;" Ohio, on "Coal Screening;" Nebraska, on "Conservation," by a Permanent Commission; Connecticut, on "Convict Labor;" Pennsylvania, on "Dependency;" Delaware, on "Drainage;" Massachusetts, on "Drunkenness;" Vermont, Indiana and Tennessee, on "Employers and Workmen's Compensation;" New York, on "Factory Conditions;" Ohio and North Carolina, on "Fire Insurance;" Ohio, North Carolina, Illinois, Pennsylvania and Wisconsin, on "Fire Insurance Rates and Practices;" Ohio, on "Floods and Flood Prevention;" Pennsylvania, on "Cold Storage and the Preservation of Food Products;" Oregon and Massachusetts, on "Taxation of Forest Lands;" Massachusetts, California and New Jersey, on the "Conditions of Immigrants;" California, on "Industrial Welfare;" Massachusetts, on "Prevention and Care of Insanity," to be made by the State Board of Insanity; Ohio, Delaware and Georgia, on "Judicial Procedure;" California, on "Juvenile Courts;" Pennsylvania, on "Land Titles;" Nebraska, on "Legislative Reform;" Maine, on "Marketing and Purchasing of Farm Supplies;" Massachusetts, on "Marriage Restrictions;" Michigan and Wisconsin, on the "Minimum Wage," the latter under the Industrial Commission; Illinois, on "Mining;" Massachusetts and New York, on "Mothers' Pensions;" New Jersey, on "Municipal Administration;" Massachusetts and Ohio, on "Municipal Finance;" Ohio, on "Occupational Diseases;" California and Wisconsin, on "Old Age Pensions," the latter under the Industrial Commission; California, on "Education of Orphans;" Massachusetts, on "Civil Service Pensions;" Illinois and Massachusetts, on "White Slave Traffic;" New England States, on "Railroad Development;" California, on "Recreation," including recreation in rural communities; Ohio and California, on "Highways;" California and Maryland, on "Rural Life;" Minnesota, Nebraska, Ohio, on the "Public School System;" New York, Georgia, North Carolina, on "Textbooks;" Iowa, South Dakota, Illinois, Oklahoma, Minnesota, on the "Organization of State Government and its Efficiency;" Massachusetts and Connecticut, on "Purchasing State Supplies;" Massachusetts, "Street Railway System of Boston;" Nebraska, New York, Oregon, on "Taxation;" Massachusetts and Vermont, on "Tuberculosis;" Illinois, on "Unemployment;" Massachusetts, on "Vagrancy;" Illinois, on "Fraud in Purchasing Voting Machines;" Massachusetts, on "Water Conservation;" Nebraska and Vermont, on "Conservation of Water Power;" Indiana, Massachusetts, on "Labor of Women."

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A few of these reports have already been made to the legislatures now in session. The rest will be made to the sessions which convene in January, 1915.

Changes in Legislative Procedure in 1913: Rules never assure their own enforcement either in statutes or parliamentary law. In the latter this is especially true, often the actual practice may represent a standard of action almost the exact opposite of that commanded, constitutional provisions regulating procedure are often flagrantly disregarded—witness the disobedience of the rules as to the readings of bills in many States—rules adopted by joint resolution receive even less consideration, and in some States procedure is for all or part of the session thrown to the winds and the actual control surrendered into the hands of the speaker or the measures are passed under a rough and ready "unanimous consent" system.[1] As a result of the ability and willingness to change the rule for individual cases the written parliamentary law is much more static than actual practice.

Changes in procedure therefore though they represent attempts to escape from the disadvantages of the old rules do not measure the extent of the actual modification which has occurred; the latter can be estimated only by one familiar with the public sentiment back of the new rules and by actual practice under them.

Constitutional Provisions Affecting Legislation. 1. Far the most interesting legislative expedient tried in the past year is found in California where the "split session" amendment adopted by the people October 10, 1911, was first put into operation. The new constitutional rule provides[2] that excepting extraordinary sessions, the meetings of the legislature shall be biennial. The legislature shall meet on the first Monday in January and remain in session for not more than thirty days. Then a recess must be taken for not less than thirty days. On reassembling only those bills already introduced are to be considered

[1] Hon. M. D. Hull of the senate of Illinois reports: "In my first session we had a so-called 'steering committee' of the dominant party which was supposed to have something to say with regard to what bills should be taken up on the house calendar. Really however the speaker was the whole thing and while the house had by its rules an order of business, the rules were never followed but all business was done by 'unanimous consent' or suspension of the rules in accordance with a pencil calendar made up by the speaker from day to day."—Letter December 16, 1910.

[2] Statutes and amendments to the codes, California 1913; Constitution of California, p. 20, art. iv, sec. 2.

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unless three-fourths of the members of either house vote to suspend the rule for a certain measure and in no case can any member in this second period introduce more than two bills.

The object is to insure greater publicity for proposed measures and to restrict the freedom of initiative in the introduction of bills in the second period. Comment on the actual working of the amendment in the legislature of 1913 is divided. The rule does not, as appears to have been popularly supposed, prevent the proposal and final passage of measures during the first period but the great majority of bills were then only introduced. In the five weeks recess taken in 1913 there was ample use made by the people of the privilege of talking over proposed legislation with their representatives. Women's clubs asked them to discuss the bills in which women were especially interested and commercial organizations held conferences on measures affecting business.[3] Other critics find that corrupt influences soon adapted themselves to the new order of things, and used the legislative recess as a means of misleading the people and inducing them to put pressure upon the legislators to enact laws opposed to the public interest.[4]

The experience of other States with similar legislative expedients does not indicate that the California rule will be found a permanent advantage. It is doubtful whether it will either insure the publicity it aims at or cut down the number of bills. Legislatures have repeatedly by their own rules attempted to improve the conditions of legislation by limiting the regular introduction of bills to a certain period. Thereafter bills could be introduced only under exceptional conditions. In the great majority of cases such rules have had almost no effect—the written permission of the executive, the favorable report of a committee, the large majority or even unanimous consent for introduction was almost always forthcoming. In the few cases where the legislature has stood by its original rule it has been found impossible to stop its practical defeat because the wished for new bill could be introduced under the guise of an amendment to a measure already introduced. After a little experience under such a system it seems likely that members will introduce numbers of sham bills intended to cover projects in which they feel they may later become interested. This

[3] Favorable comment is contained in *The Independent*, vol. 74 (1913), p. 829, and in A. B. Scherer, Novel Law Making in California, *Independent*, vol. 74 (1913), p. 1088.

[4] Franklin Hichborn, *Story of the Session of the California Legislature of 1913*, p. ix.

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was notably the experience of Michigan under a rule of this sort.[5] As soon as this subterfuge is resorted to, both the desired publicity of bills proposed and the limitation on the freedom to introduce bills aimed at by the California amendment seem likely to disappear.

2. The abuses which have arisen under the so-called "emergency clause" of many state constitutions regulating the time when laws shall take effect are notorious.

In some States it has become the custom to declare every act an emergency act and thus bring the actual time of operation of the laws to the same standard as is found in States where they go into effect "on passage." California in 1913 held its first session under a constitutional rule strictly defining what is to be considered an emergency[6] and Oregon adopted a rule that "The legislative assembly shall not declare an emergency in any act regulating taxation or exemption."[7]

Arizona has furnished what is probably the most extreme example of the use of an emergency clause to avoid a requirement of the constitution. That instrument required that all bills be read by sections three times in each house but the first two readings might be by title "in case of emergency."[8] The observance of the rule resulted in much delay. The attorney general in an opinion declared the right of the legislature to enter on the journal a general declaration of emergency and "that it was expedient that section 12, article iv of the constitution relating to the reading of bills by sections on first and second reading be dispensed with."[9] Thereafter no bills were read at length except on the last reading.

Laws and Rules of the Legislatures Affecting Legislative Procedure. A number of States have passed resolutions regulating the printing of calendars, journals and bills.

[5] "It was formerly the custom to limit the introduction of bills to the first fifty days of the session but since 1905 this has not been done. Under this rule a vast number of sham bills were introduced . . . . each member covering the subjects upon which he might by chance become interested later . . . . It often resulted in some wierd substituting and amending to whip a bill of this kind into shape for the uses for which it was intended."—Letter Ex-Senator G. L. Clark, December 2, 1910.

[6] Constitution of California, art. iv, sec. 11. Amendment adopted October 10, 1911.

[7] General Laws of Oregon 1913, p. 7, art. ix, adopted at the election, November 5, 1912.

[8] Constitution of Arizona, art. 4, pt. 2, sec. 12.

[9] Letter L. F. Sweeting, Clerk of the House of Representatives of Arizona, December 13(?), 1913.

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1. North Dakota provided for the daily printing of a calendar. Besides the material usually included it is to contain "a brief synopsis of each bill or resolution introduced and referred on that day." The synopsis and other material are to be "edited by a clerk to be employed for such purpose" in each house. No synopsis shall "exceed ten printed lines in length."[10]

Heretofore, the journals in North Dakota have been written records made by the secretary of the senate and chief clerk of the house "in books to be furnished by the secretary of state for that purpose."[11] Hereafter the journal is to be printed daily, examined by the recording officers and read at the beginning of the morning session, then corrected by the printer and bound. Two bound copies are deposited with the secretary of state and "constitute the true and authentic journal."[12]

Arizona has done away with reading of the journal. The printed copy is put on the desks and the members are privileged to hand in corrections or report the errors to the clerk, before the close of the day.[13]

2. Nevada took a step toward joining the growing list of States which are requiring enrolled bills to be printed. Heretofore either house might order any bill originating within it, which has passed both houses to be printed for enrollment.[14] Now every assembly and senate bill or resolution must be printed for enrollment if it exceeds six pages in length.

3. The creation of "special orders," "rules," "sifting" and other variously named committees which, usually near the end of the session, are given the duty to select the more important measures from among the large number of bills introduced, is becoming increasingly frequent. This is the favorite expedient for escaping from the consequences of unlimited freedom of initiative in the introduction of measures and from our cumbersome procedure. The functions of these committees are usually not stated in the rules, but to this exceptions are appearing. Montana has a committee officially known as the "steering committee" and in 1913 Oregon by joint resoltion created an "advisory committee," composed of the presiding officers of the houses acting with one senator and two members of the house. Its duty lay in "assisting the other committees in expediting legislation now before the legislature."[15]

[10] Laws of North Dakota, 1913, p. 320, ch. 202.
[11] Revised Code of the State of North Dakota, sec. 54.
[12] Laws of North Dakota, 1913, p. 319, ch. 201.
[13] L. F. Sweeting, Chief Clerk of the House, December, 1913.
[14] Revised Laws of Nevada 1912, p. 4124.
[15] General Laws of Oregon, 1913, p. 798.

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4. California seriously considered the entire recasting of her legislative procedure. A carefully drawn system of rules was prepared by Senator Leroy A. Wright, embodying what he considered the best practice in all the state legislatures. One of its prominent features was the adoption of joint committee similar to those in use in Massachusetts. The system as a whole failed of adoption but several of its suggestions were accepted. The two houses now have standing committees of the same number of names, definite provision is made for joint meetings to consider bills introduced in both houses and two joint committees are created.[16] To one of these, unless the house where the bill originated ordered otherwise, all bills were sent for revision before being printed. Its powers however only extended to correcting errors in spelling, inserting the enacting clause and correcting mistakes in numbering sections and references thereto, errors in grammar, phraseology or in the form of the bill."[17] A proposal to confer wider powers was defeated.[18]

5. The Illinois house of representatives adopted an expedient which aims to give a greater prestige to measures supported by the governor. A bill or resolution introduced to carry out a recommendation of the governor may by executive message addressed to the speaker be made an administrative measure. When a bill of this sort has been reported out of committee it has precedence over all other bills except appropriation bills. The house is to sit in committee of the whole on these bills on Tuesday morning.[19] A proposal to give a similar precedence to bills to carry out party platform pledges and the recommendations of the governor's message failed of adoption in Wisconsin.

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Bill Drafting: Ten years ago, scientific drafting of legislative bills scarcely existed. Since that time, not only have the necessity and the value of expert technical assistance to law makers been clearly demonstrated to, and accepted by, students of modern statute law, but such service has received official recognition in the statute books of over a dozen States. This authority to draft bills is included, in most instances, in

[16] Joint Rule, No. 33, Session 1913.
[17] Joint Rule, No. 30, Session 1913.
[18] Franklin Hichborn, Story of the California Legislature of 1913, p. 47.
[19] See comment by Hon. M. D. Hull in AMERICAN POLITICAL SCIENCE REVIEW May, 1913, p. 239.

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the laws creating legislative reference departments or bureaus. In three States, Connecticut, Massachusetts and New York, bill drafting is a separate function carried on in connection with the legislature. The state universities of Colorado and Washington have, without special enactment, developed bureaus of legislative reference which undertake bill drafting to some extent.

The States conferring on those in charge of legislative reference work, the power to draft bills are given below, with brief excerpts from the laws as they stand at present. How much bill drafting is actually done under these enactments depends largely upon the personnel and organization of the bureau, the amount of the appropriation, etc., and varies widely.

California. "The chief [of the legislative counsel bureau] must have practical knowledge of the substantive and remedial laws of the State."

"It shall be the duty of the chief of the legislative counsel bureau and the work of that bureau to prepare and assist in the preparation, amendment and consideration of legislative bills when requested or upon suggestion as herein provided. . . . . The legislative counsel bureau and its chief shall prepare or assist in the preparation or amendment of legislative bills at the suggestion, in writing and as herein set forth, of the governor of the State or of any judge of the supreme court or of the district courts of appeal or of the superior courts of the State, or of any committee of the senate or assembly of the legislature of the State. All such suggestions shall set forth the substance of the provisions desired or which may be needed with the reasons therefor. Such suggestion by a judge of the supreme court shall be filed with the clerk of that court. Such suggestion by a judge of a district court of appeal shall be filed with the clerk of that court. Such suggestion by a judge of a superior court shall be filed with the clerk of the district court of appeal of the district within which such superior court is located. When such suggestion is so filed with the clerk of the supreme court or of a district court of appeal, that clerk shall make and send to the permanent office of said bureau a certified copy of such suggestion and all other suggestions shall be filed at said office and all such papers so received at such office shall be there permanently filed and recorded and copies furnished to the chief of the legislative counsel bureau; all provided, that from the time the legislature of the State convenes until it is adjourned finally the legislative counsel bureau and its chief shall give such consideration to and service concerning any bill before the legislature which circumstances will permit, and which is in

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any way requested by the governor of the State or the senate or the assembly or any committee of the legislature having such bills before it for consideration, and after such adjournment, the chief of the legislative counsel bureau shall still remain so subject to such request by the governor of the State as to any bill still in his hands for rejection or approval or other action; provided, further, that neither the chief nor any employee of the bureau shall oppose or urge legislation; but the bureau shall, upon request, and so far as may be in its power, aid and assist any member of the legislature as to bills, resolutions and measures drafting the same into proper form and furnishing to them the fullest information upon all matters in the scope of the bureau." (Laws, 1913, p. 626.)

Illinois. "The said reference bureau shall afford to any member of the general assembly upon his request, such legal assistance and information as may be practicable in the preparation of bills, memorials, resolutions, orders and amendments, alterations, changes thereto, and revisions and substitutes thereof, proposed to be introduced in the general assembly by said member." (Laws, 1913, p. 391.)

Indiana. "The director shall have thorough training and experience in the principles of government and political science, constitutional and administrative law and in the drafting of statute law."

"The director shall appoint such assistants, investigators and draftsmen as may be necessary."

"It [the bureau of legislative and administrative information] shall be prepared to furnish to members of the general assembly and under their instruction such assistance as may be demanded in the preparation and drafting of legislative bills." (Laws, 1913, p. 694.)

Maryland. "It shall be the duty of said executive officer [of the department of legislative reference of Baltimore], ... to prepare or advise in the preparation of any bill, ordinance or resolution when requested so to do by any member of the city council." (Laws, 1906, p. 1123.)

Michigan. "He [assistant, appointed by the state librarian] shall also give such advice and assistance to the members of the legislature as they may require in the preparation of bills and resolutions and shall draft bills upon such subjects as they may desire." (Laws, 1907, p. 405.)

Montana. "The object of said [legislative reference] bureau shall be to gather and make available such information as shall aid the members of the legislature in the discharge of their duties and to render assistance in the drafting of bills." (Laws, 1909, p. 79.)

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Nebraska. "The director [of the legislative reference bureau] and his assistants shall neither oppose nor urge legislation, but may upon request aid and assist the members of the legislature and the executive department as to bills, resolutions and measures, drafting the same into proper form." (Laws, 1911, p. 310.)

"Neither the director nor the assistant director nor any employee of the legislative reference bureau shall draft or prepare any bill for introduction into the legislature for any member of the legislature or for any other person, except on the payment of $5 for each and every bill that may be so prepared by any employee of said bureau which sum shall be paid into the state treasury for the benefit of the general fund." (Laws, 1913, p. 733.)

North Dakota. "It shall be the duty of the librarian of the state library commission to assist in every way possible the members of the legislative assembly in obtaining information and the preparation of bills." (Laws, 1907, p. 381.)

Ohio. "It shall be the duty of the director [of the legislative reference department] . . . . to prepare or advise in the preparation of any bill or resolution when requested to do so by the governor or by any member of the general assembly." (Laws, 1913, p. 8.)

Pennsylvania. "The director [of the legislative reference bureau] and his assistants. . . . . shall, upon request, aid and assist the members of the general assembly, the governor, and the heads of departments by advising as to bills, and resolutions, and drafting the same into proper form." (Laws, 1909, p. 208.)

South Dakota. "The state librarian. . . . . shall, as required, provide for the use of members of the legislature such information and assist in drafting bills and, in every reasonable way, make the division useful in the preparation of legislation." (Laws, 1907, p. 395.)

Texas. "Said assistant librarian [of the library and historical commission] shall give the members of the legislature such aid and assistance in the drafting of bills and resolutions as may be asked." (Laws, 1909, p. 26.)

Wisconsin. "The free library commission shall employ during each legislative session and the two months next preceding draughtsmen and such help as may be necessary for the draughting of bills." (Laws, 1913, p. 1270.)

Separate bill drafting departments are maintained in three States, Connecticut, New York and Massachusetts. In the first two, the law on this point is as follows:

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Connecticut. "It shall be the duty of the clerk of bills to assist members of the general assembly in drafting bills for public acts and resolutions of a public nature and to prepare amendments to or substitutes for bills or resolutions at the request of committee. Every bill or resolution favorably acted upon by any committee of the general assembly shall, before being reported to either branch thereof, be first submitted to the clerk of bills who shall examine such bill or resolution in respect to its form for the purpose of avoiding repetitions and unconstitutional provisions and insuring accuracy in the text and references, clearness and conciseness in the phraseology and the consistency of statutes and shall return to the committee submitting it any bill or resolution that is not in correct form, with such corrections as he may propose in the form of a substitute or as amendments. He shall keep a record of each petition, bill for a public act, and resolution introduced in the house or senate; and such record shall be so kept in detail that it will disclose where said petition, bill or resolution may be found. Such record shall, at all times be open to the inspection of members of the general assembly and to all executive state officials. (Laws, 1901, ch. 1, sec. 2–4.)

New York (State). "The temporary president of the senate and the speaker of the assembly shall appoint such number of competent persons as may be needed not exceeding three whose duty it shall be during the session of the legislature on request of either house of the legislature or of any committee, member or officer thereof, to draft bills, examine and revise proposed bills and advise as to the consistency or other effect of proposed legislation. Such persons shall receive a compensation to be fixed by the temporary president of the senate and the speaker of the assembly and shall be entitled to their clerical and other necessary expenses, to be approved by such officers." (Consolidated laws, 1909, v. 3, p. 2116, sec. 24, legislative law.)

In Massachusetts, senate rules no. 20, 21, 33, as given in part below, confer on the senate committee on rules the power to employ, under the heading "clerical assistance," draftsmen and assistants. The house, with no specific house rule on the subject, authorizes, at the beginning of the session, similar functions and assistants for the house committee on rules.

Massachusetts. "All bills and resolves for introduction on leave, resolutions, and petitions for legislation accompanied by bills or resolves embodying the subject-matter prayed for and all orders of inquiry, which are intended for presentation or introduction to the senate, and all reports of state officers, shall first be deposited with the clerk, and,

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prior to their presentation or introduction, shall be submitted by him to the committee on rules for inspection. The committee shall examine the same for the purpose of ascertaining (1) whether the legislation proposed is plainly and specifically stated or already provided for; (2) whether such bills, resolves, resolutions, petitions and orders are in proper form; and (3) that compliance has been had with the rules of the senate and the joint rules of the two branches." (Senate rule 20.)

"The committee on rules shall make no change in the substance or form of any matter referred to them in accordance with the preceding rule, without the consent of the member depositing the same, but upon the presentation or introduction of any such matter to the senate it shall be the duty of some member of the committee on rules, acting under the committee's instruction, to suggest any failure to comply with the rules, and to offer such amendment or propose such other action as is determined proper or necessary by the committee within the scope of its duties, as above set forth." (Senate rule 21.)

"Bills and resolves when ordered to a third reading shall be referred to the committee on bills in the third reading, whose duty it shall be to examine and correct them, for the purpose of avoiding repetitions and unconstitutional provisions, and of insuring accuracy in the text and references, and consistency with the language of existing statutes; but any change in the sense or legal effect, or any material change in construction shall be reported to the senate as an amendment. Resolutions received from the house or introduced or reported in the senate shall, after they are read and before they are adopted, be referred in like manner, to the committee on bills in the third reading. When a bill, resolve, or resolution has been so referred, no further action shall be taken until report thereon has been made by the committee." (Senate rule 33.)

The Vermont law as bringing together, coöperatively, the purely legislative reference work and the bill drafting department under one law, is quoted at length.

Vermont. Section 2. "It shall be the duty of the legislative reference librarian to coöperate with the revisers of bills hereinafter described and he shall act as a coördinate member of their board in any exigency requiring a third member or in any case where a reviser is temporarily unable to perform the duties of his office."

Section 3. "Two men of legal training and practice who have had legislative experience but who shall not be eligible to membership in either branch of the legislature during incumbency in this office, shall be

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appointed by the governor and confirmed by the senate, to be known as the revisers of bills and to perform until removed for cause, the duties hereinafter prescribed. . . . . The revisers of bills shall perform their duties in the office of and in connection with the legislative reference bureau in the state library."

Section 4. "It shall be the duty of the revisers of bills to examine previous to their introduction, all bills and resolutions presented to either branch of the legislature, making such corrections as may be necessary to secure accuracy in the text and references, clear and concise language and consistency with existing statutes and to avoid repetitions and unconstitutional provisions. No bill or resolution, whether introduced by a member or a committee shall be acted upon by either house until corrected and endorsed by the revisers of bills who shall, if the assembly be in session, make their corrections upon bills and amendments within the time allowed by the rules of the senate and house of representatives. The revisers shall give assistance to members and committees in the drafting of bills, resolutions and amendments, if so requested. A reviser shall not oppose nor urge legislation; he shall not materially alter the substance of a bill or resolution; and no one connected with the office shall communicate the substance of any bill or resolution without permission of its introducer."

Section 5. "Whenever necessary in the intervals between the sessions of the legislature, the revisers of bills may meet for work at the capitol but they shall be required to be in actual session in the office of the legislative reference librarian from a date not less than 30 days prior to the opening of a regular session of the general assembly until the final adjournment thereof. Within three days after the election of a general assembly the sergeant-at-arms shall forward immediately to all senators and representatives-elect a sufficient number of blanks for the preparation of bills together with a notice in the following form:

To the ———— elect of the ———— of ————:

You are hereby notified that the revisers of bills will be in session at the state library in Montpelier on and after ———— and you are urged to prepare and forward to them at once any bills which you desire to introduce for enactment by the general assembly.

————————

Sergeant-at-Arms.

Provided, however, that nothing in this act shall be construed as placing any limit upon the time allowed for the introduction of bills by the rules which either branch of the legislature may adopt."

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Section 7. "The revisers of bills shall receive a salary of seven and one-half dollars a day and necessary expenses for actual time spent and may employ at the expense of the State necessary clerical and stenographic assistance." (Laws, 1912, p. 14.)

ETHEL CLELAND,
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Initiative and Referendum: The sentiment in favor of direct legislation during 1913 was exceptionally strong and succeeded in expressing itself in a number of concrete and well matured measures. Legislation providing for the initiative and referendum or perfecting existing statutes and constitutional amendments was enacted in 19 States, including Arizona, Arkansas, California, Colorado, Iowa, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Washington and Wisconsin. These acts and resolutions provide for the adoption of the necessary constitutional amendments, prescribe the procedure in carrying out the amendments already adopted and describe the actual propositions on which a plebiscite has been demanded.

Constitutional Amendments. Proposals for constitutional amendments to establish the initiative and the referendum were adopted by the legislatures of seven States during 1913, including Iowa, Michigan, Minnesota, Missouri, North Dakota, Texas and Wisconsin. The Michigan amendment, which was submitted to the people in April, 1913, provides for the statutory and constitutional initiative and the referendum. All three propositions were adopted by substantial majorities, although the vote in favor of the constitutional initiative was considerably the least. Petitions designed to initiate constitutional amendments must be signed by at least 10 per cent and legislative measures by at least 8 per cent of the qualified electors and they are adopted if approved by a majority of the electors voting thereon. Any act of the legislature is subject to the referendum, except appropriation and emergency measures, if a petition signed by 5 per cent of the qualified electors is filed in protest.[1] The amendments proposed in the other six States will be voted on at the general election of 1914. The Minnesota amendment provides for the constitutional and statutory initiative and the referendum. Constitutional amendments may be initiated by 2 per cent of the qualified electors. The legislature may submit

[1] Laws 1913, p. 780.

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the proposed amendment to the people or if they refuse to submit it or submit it in an altered form, then on petition of 8 per cent of the qualified electors, the proposed amendment as originally presented or in an amended form may be submitted directly to the people for adoption or rejection. If approved by a majority of the electors voting at the election or by at least 4 to 7 of the electors voting on the proposed amendment provided not less than 3 to 7 of the electors voting at the election voted for the proposed amendment, it is adopted. The statutory initiative is similar except that the original petition is signed by 2 per cent of the qualified electors and the subsequent petition by 6 per cent and a majority vote is sufficient to adopt. Referendum petitions must be signed by 6 per cent of the qualified electors. All measures except emergency measures are subject to the referendum and they must pass by a 2 to 3 vote of each house to be so designated. If the referendum petition is signed by 15 per cent of the electors the objectionable part is suspended until the referendum vote is had.[2] The Iowa amendment fixes the number of qualified electors necessary to propose a measure at from 12 to 22 per cent, and the number required to invoke the referendum at from 10 to 20 per cent, the legislative assembly being authorized to designate the exact per cent.[3] The Missouri amendment provides for the initiation of any measure if requested by 8 per cent and the reference if petitioned for by 5 per cent of the qualified electors resident in 2 to 3 of the congressional districts.[4] In North Dakota, both the initiative and referendum may be invoked on petition signed by at least 10 per cent of the qualified electors resident in a majority of the counties of the State. Initiated measures take precedence over all others in the legislature except appropriation bills and must be disposed of within forty days, but the assembly may propose a similar measure to accomplish the same purpose and both are then submitted to a direct vote of the people. Any measure may be referred to a vote of the people by a majority vote of the legislative assembly.[5] The proposed Texas amendment fixes the number of qualified electors necessary to invoke the initiative or the referendum at 20 per cent[6] and Wisconsin at 8 per cent, not more than half of whom are from any one county.[7] A constitu-

[2] Laws 1913, p. 889.
[3] Laws 1913, p. 423.
[4] Laws 1913, p. 774.
[5] Laws 1913, p. 127.
[6] Laws 1913, p. 464.
[7] Laws 1913, p. 1369.

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tional amendment was adopted in Massachusetts in November, 1913, which provides that the general court shall have the authority to refer any act or resolve to the people for approval or rejection by a majority vote.[8]

Comprehensive State-Wide Initiative and Referendum Acts. Nebraska, Washington and Colorado passed comprehensive state-wide initiative and referendum acts prescribing detailed procedure in invoking these measures, including the preparation and filing of petitions, the drafting of appropriate ballot titles, the publication of measures to be submitted to the plebiscite, with both favorable and unfavorable arguments, the persons or organizations responsible for the initiation of the measure, the placing of the initiated or referential measure on the ballot so as to avoid entangling alliances with the residue of the party ticket.[9]

Initiative and Referendum in Municipalities. Arkansas, Missouri and Colorado provided for the municipal referendum. In Arkansas the petitions protesting against the passage of any ordinance are signed by 20 per cent of the legal voters,[10] in Colorado by 15 per cent, and in Missouri by 10 per cent. Ordinances, charters or charter amendments may be initiated in any Colorado city on petition signed by 5 per cent of the qualified electors,[11] and in cities of the second class in Missouri by 15 per cent, where also the referendum on granting of franchises and providing for the sale of municipal utilities is obligatory.[12]

Amendments to Existing Laws. In those States which already had the initiative and referendum, several amendments or supplementary statutes were enacted designed to facilitate the operation of the laws to clarify the procedure and to safeguard the plebiscite from corrupt practices. The Montana law was amended to provide for an appropriate numbering of the measures which are submitted to a vote of the people, and to restrict the descriptive matter on the ballot to ten words.[13] Oklahoma in two separate statutes provided for the printing of a separate ballot when state questions are submitted to a referendum vote, and prescribed punishment for the illegal expenditure of public funds for the purpose of promoting the adoption or defeat of any such

[8] Laws 1913, p. 1174.
[9] Laws 1913, Nebraska, p. 488; Washington, p. 418; and Colorado, p. 310.
[10] Laws 1913, p. 563.
[11] Laws 1913, p. 310.
[12] Laws 1913, p. 441, 443 and 445.
[13] Laws 1913, p. 129.

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measures.[14] Ohio supplemented her initiative and referendum laws by prohibiting the giving or receiving of money for signing petitions; providing that the initiative and referendum shall apply equally to each of the several plans of municipal government provided for in that State; requiring the publication of referendum measures in pamphlet form for distribution; and providing that petitions designed to invoke the initiative or referendum in any municipality shall be signed by 10 per cent instead of 30 per cent of the qualified electors; and that all ordinances shall be subject to the referendum.[15] Besides altering the general procedure outlined in the law, Oregon has provided that the ballot titles of measures shall contain the names of the persons or organizations by whose authority the measure was initiated; a distinctive short title of not to exceed ten words; and a general title of not to exceed 100 words expressing the purpose of the measure.[16] Wisconsin, by a slight amendment to her law, prohibits members of the common council of any city or any municipal officer from circulating referendum petitions.[17] To insure adequate familiarity with measures to be voted on, Massachusetts provided for the printing and distribution of copies of any proposed law or amendment to each voter in any city of the State, or upon a vote of the city council, with the approval of the mayor, the general purport of the law may be substituted, or no such documents may be distributed at all.[18] Colorado, by an act approved April 13, forbids any state officer or employer from preparing or circulating any initiative or referendum petition, or soliciting any person to sign such petition.[19] California restricts signatures to registered, qualified electors, provides for the preparation of ballot titles, the creation of a board of title commissioners and the placing of propositions to be voted on at the right of the ballot.[20]

Initiated Measures Adopted. Two initiated measures were adopted by Oklahoma, one providing for the preferential selection of United States senators, and the other for the creation of a state board of agriculture.[21] The State of Oregon, to which these measures are indig-

[14] Laws 1913, p. 91 and 111.
[15] Laws 1913, p. 653, 784, 831 and 211.
[16] Laws 1913, p. 67 and 743.
[17] Laws 1913, p. 1091.
[18] Laws 1913, p. 344.
[19] Laws 1913, p. 309.
[20] Laws 1913, p. 225 and 1157.
[21] Laws 1913, p. 733 and 737.

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enous has been by far the most active. At the general election of November 5, 1912, three constitutional amendments and seven laws were adopted. The constitutional amendments approved provide for woman's suffrage and bonding the State and the several counties for the construction and maintenance of roads in any sum not in excess, with other constitutional liabilities, of 2 per cent of the assessed valuation of the taxable property. The laws adopted are designed to provide for the regulation of public utilities; to afford protection to subcontractors, laborers and material men and to fix a day's labor at eight hours when the State or any political subdivision thereof is a party to the contract; to prohibit the employment of state or municipal convicts by persons or private corporations and to provide for their employment on the public highways; to remove from the tax exemption lists lands belonging to the State or any public corporation and held under contract for the purchase thereof; to provide for the classification of freight ratings and minimum carload weights; to prohibit Harney County from building a court house before 1916, and to refund all taxes raised for that purpose; and to abolish the county high school of Wallowa County.[22] Arizona has been hardly less active. At the general election of November 5, 1912, eight acts were adopted by the referendum vote and became effective one month later, on December 5. These laws provide for the attachment of liens to mines and mining claims in favor of laborers and materialmen; the semi-monthly payment of wages to employees; full train crews; the installation of electric head lights of 1500 candle power on all locomotives; an apprenticeship of three years for engineers and conductors; the limitation of the number of cars in freight and passenger trains; the fixing of the rate for transporting passengers at three cents per mile but authorizing the corporation commission to exempt any railroad upon satisfactory proof that it is not earning a just and reasonable compensation for the services rendered; and providing for the preservation of game, birds and animals. At the same election, a constitutional amendment providing for woman's suffrage was adopted.[23]

Initiated Measures Rejected. Oregon rejected two measures providing for additional equipment for the University.[24]

Acts Against which Referendum Petitions were Filed. Up to June 3, 1913, referendum petitions were filed against five acts passed by the

[22] Laws 1913, p. 7 to 20.
[23] Laws 1913, p. 5 and 7 to 32.
[24] Laws 1913, p. 10 (?).

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legislative assembly of Oregon of that year and these measures will be submitted to a vote of the people on November, 1913. The acts which the people will be called upon to approve or reject provide for the asexualization of habitual criminals, moral degenerates and sexual perverts;[25] for the creation of a state industrial accident commission and an industrial accident fund;[26] for the appropriation of $175,000 for the construction of additional buildings at the University of Oregon;[27] and for certain repairs and improvements;[28] and for the election of district attorneys in the several counties of the State.[29]

The people of the State of Washington will vote on two propositions which were submitted by the legislature. The first of these provides for the irrigation of Quincy Valley and the second for the establishment of a retirement fund to be used in the payment of annuities and benefits to retired teachers.[30]

Massachusetts by an act approved June 16, provided for submitting to the qualified electors of every city and town in the State the question whether eight hours shall constitute a day's work for city and town employees.[31]

Propositions to be Voted on in 1914. Several initial propositions will be submitted to a vote of the people this year. South Dakota will vote on a constitutional amendment to provide that "in the case of municipalities the legislature shall by law fix the percentage of the qualified electors of the municipality that shall be required to invoke either the initiative or referendum,[32] and on two statutes, one a direct primary law for endorsing party candidates for President, and United States senator and for making party nominations for congressmen and all state, county and judicial officers and for electing delegates to national and state conventions and national, state, county and precinct committeemen,[33] the other to provide for the regulation of the manufacture and sale of intoxicating liquors.[34] Oregon will vote on ten initiated propositions on November, 1914. Three of these are laws and include

[25] Laws 1913, p. 99.
[26] Laws 1913, p. 188.
[27] Laws 1913, p. 403.
[28] Laws 1913, p. 405.
[29] Laws 1913, p. 686.
[30] Laws 1913, p. 660, 129.
[31] Laws 1913, p. 920.
[32] Laws 1913, p. 173.
[33] Laws 1913, p. 243.
[34] Laws 1913, p. 376.

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provisions for the permanent support of the Eastern Oregon State Normal School at Weston,[35] to provide for a committee of four from the senate and six from the house to act with the tax commission, in preparing measures relating to taxation,[36] and to provide for the permanent support of the Southern Oregon State Normal School at Ashland.[37] There are in addition seven constitutional amendments granting all citizens over twenty-one years of age the right to vote,[38] authorizing the election of a lieutenant-governor in 1918 to serve during the absence or inability of the governor;[39] to lend the credit of the State in building roads, constructing irrigation or power projects and developing the untilled lands, to the extent of 2 per cent of the assessed valuation of the taxable property of the State,[40] to provide for reasonable classification of property for taxation, graduated, proportional and progressive with reasonable exemptions,[41] for the merging of contiguous municipalities,[42] to provide that in any county containing a city having a population of 100,000, a new county may be established with boundaries coterminous and co-extensive with the boundaries of the city and that the city and county government may be consolidated and a new county created out of the excluded portions,[43] and to fix the compensation of the members of the legislative assembly at $5 per day or not to exceed $300 for any regular or $125 for any special session.[44] The question of the salaries of the county officers of Columbia County is to be submitted to the voters of that county at the same time.[45]

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Indianapolis, Ind.

Public Health Council: A measure of unusual significance from the administrative point of view was enacted in New York in 1913, in the creation of a public health council with wide and extensive powers.

The council is to consist of seven members including the commissioner

[35] Laws 1913, p. 354.
[36] Laws 1913, p. 800.
[37] Laws 1913, p. 275.
[38] Laws 1913, p. 795.
[39] Laws 1913, p. 802.
[40] Laws 1913, p. 797.
[41] Laws 1913, p. 803.
[42] Laws 1913, p. 804.
[43] Laws 1913, p. 805.
[44] Laws 1913, p. 805.
[45] Laws 1913, p. 770.

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of health. Three of the members are to be physicians with training or experience in sanitary science and one must be a sanitary engineer. It is not intended that the members of the council shall give all of their time to the work and a nominal salary of $1000 is provided.

The important powers granted to the public health council consist in establishing or amending sanitary regulations, called in the act "the sanitary code," for all parts of the State except the city of New York. "The sanitary code may deal with any matters affecting the security of life or health or the preservation and improvement of public health in the State of New York and with any matters as to which jurisdiction is hereinafter conferred upon the public health council."

Among other provisions the code may include provisions regulating the practice of midwifery. In order to make more certain the application of the ordinance of the public health council, it is provided that the council shall state the date on which it takes effect, and file a copy in the office of the secretary of state and it is required that a copy shall be sent to each health officer within the State and be published in such manner as the public health council may from time to time determine.

"The provisions of the sanitary code shall have the force and effect of law and every violation of any portion thereof may be declared to be a misdemeanor."

The provisions of the sanitary code shall as to matters to which it relates and in the territory prescribed therefor by the public health council, supersede all local ordinances heretofore or hereafter enacted inconsistent therewith." Cities, towns and villages may, however, enact necessary regulations not inconsistent with the sanitary code.

The council may prescribe the qualifications of directors of divisions, sanitary supervisors, local health officers, and public health nurses but the council has no executive, administrative or appointive duties.

The remainder of the act codifies laws relating to public health officers, state and local, making numerous changes in the powers of the state health commissioner and in his relation to the local authorities.[1]

Constitutional Amendments: A unique solution of the problem of amending the state constitution in Indiana was adopted in 1911 (ch. 219). This State has the provision that amendments presented to the people must receive a majority of all the voters voting at the election. Thus if the head of the ticket at a general election receives a total of

[1] Ch. 559, Laws of New York, 1913.

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600,000 votes, an amendment to carry must receive a majority of that number even though there may be few votes cast in opposition. It has frequently happened that amendments have failed to pass, not because of the opposition to them but because the people failed to vote on the proposition. In fact no amendment except one has ever been carried at a regular election. A recent proposal—to fix qualifications for lawyers—has been submitted three times with no results. The law of 1911 provides for endorsement or disapproval by political parties of pending amendments. The action of the party is certified to the secretary of state and the amendment is to be printed upon the party ticket. If the voter votes a straight ticket he thereby automatically votes on the amendment according to the action of his party. He may of course mark his ballot on such amendments as he pleases in the same manner that he votes a split ticket.

No questions have yet been presented under this provision.

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As a result of trouble encountered at the last municipal election there are likely to be several changes in the Boston charter. It was found that owing to the large quota of signatures required on nomination papers (5000 for each candidate) the forging of names was carried on with more or less impunity. Even the jurats or sworn statements as to genuineness, which appeared at the foot of each nomination paper, were shown to have been falsified in many cases. It is altogether probable that the Massachusetts legislature, at its present session, will abolish the jurat requirement altogether, and will greatly reduce the number of signatures required on nomination papers. The charter provisions which set a January date for the municipal election are also likely to be repealed. The existing date makes it necessary that the municipal campaign be carried through the Christmas season, to the injury of private business and to the considerable annoyance of the public. In other respects the Boston charter has worked very well since its adoption four years ago.

The advisory "Heights of Buildings Commission" has presented its report to the committee on the height, size and arrangement of buildings of the New York board of estimate and apportionment (December, 1913, 78 pp., with charts and diagrams). The results of the commission's study have come after inquiry into building regulations in practically every large city of the world, special investigations in many large American, Canadian and European cities, hearings at which all with views were invited to express them, and, especially, the most careful scrutiny of conditions prevailing in New York City.

The commission has found conclusive evidence that there should be far more public control over building development. It recommends well-considered and reasonable restrictions on all building as the most effective means of conserving property values—and thereby affecting public welfare in providing light, air and adequate street facilities.

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This will involve, in New York, merely a more general application and extension of methods of control already in force regarding building regulations. In brief, the specific recommendations are as follows: The height of buildings should be limited at the street line to twice the width of the street, not to be less than 100 or more than 300 feet. When this limit is reached, the building may be made higher by setting the street walls above the limit back 1 foot for each 4 feet of increased height, thus permitting mansards or vertical walls. The cornice may not project into the street by more than 5 per cent of the street width. Buildings may cover the entire lot up to the first story; thereafter 10 per cent of every interior lot must be left vacant, and, except on corner lots, this space must be left at the rear. Thus, as a rule, there will be at least a 20-foot open court between two back-to-back buildings, to allow ventilation. Exceptions may be made to these and other minor restrictions in the case of buildings erected on lots of specified sizes and shapes where adequate light and air are certain to be afforded. The rules do not apply, moreover, to towers, which may be erected to any height provided not more than 25 per cent of the lot is covered by the tower and every part of it is kept at least 20 per cent from the lot and street lines.

At the conference of art commissions held in New York last May on the invitation of the art commission of the city of New York, there was appointed a committee to draft acts for the establishment of an art commission in a city of the first class and in a city of the second class, and for a state art commission. When the city planning commission began to assume prominence in municipalities, it was believed that the work of the art commission would be taken over in the consideration of city planning; this, however, has not proved to be the case. And it is the failure of the city planning commission to give adequate attention to the aesthetic side of city planning in its insistence on the social and economic features in city development, which has led to a revival of interest in the art commission.

The report of the committee urges the need of every city for a commission of this sort, and it makes recommendations concerning the commission itself. First, its membership should consist of seven persons in cities of the first class and five in second-class cities; the mayor or governor, as the case may be, to be a member *ex officio*, the remaining members to be equally divided among laymen and artists. When a particular city department is concerned, it is advised that the head

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of that department should sit with the commission. Second, the commission should have jurisdiction over all works of art on public property—works of art to include all "paintings, mural decorations, stained glass, statues, bas-reliefs, tablets, sculpture, monuments, fountains, arches and other structures of permanent character intended for ornament or commemoration." No such object should become public property until approved by the commission, which is also to have power to pass on designs of buildings, bridges, approaches, gates, lamps, etc., erected on city land, as well as the designs of public parks, grounds, streets, etc., and all similar objects which in any way infringe on public property. And, finally, in the case of a city commission, it should have the actual veto power; a state commission having the power of recommendation.

In general, it might be said that the art commission is intended to have judicial and critical functions only, whereas the city planning commission has power to originate.

The optional charter bill which has been presented to the New York legislature provides six forms of charters, each more or less different, from which a municipality in the State may make a choice. These six charter-plans are as follows: (1) commission government, with a council of five, one member to act as chairman-mayor without the veto power; (2) a council of five with a city manager; (3) a council of five with a mayor having the veto power; (4) the mayor and council (the "White" charter); (5) and (6) slight variations of the mayor and council form.

By reason of a decision which was recently rendered by the Supreme Court of the United States, the ordinance relating to billboards in St. Louis has been sustained after a long fight between the city and the billboard companies. Accordingly, the city building commissioner had ordered the destruction of nearly one thousand billboards in St. Louis, as being not in line with the provisions of the ordinance. One of the large companies has already agreed to remodel between two and three hundred billboards to conform to the new city regulations.

The *Citizens' Bulletin*, which has been published weekly in Cincinnati since 1903, has been discontinued with the close of 1913, owing to the fact that civic conditions in Cincinnati have been so improved that the publication of the *Bulletin* is no longer thought necessary. The city

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of Cleveland is the latest city to join the ranks of those publishing a municipal periodical, and now issues the *City Record.*

The extent to which municipal officeholders in Philadelphia have been assessed for campaign contributions is the subject of a pamphlet prepared by Director M. L. Cooke of the department of public works. Mr. Cooke produces evidence to show that, up to the time of the election of Mayor Blankenburg, and to some extent since then, there has been a definite system of levy upon the salaries of city employees based upon a sliding scale of percentages of the salaries received. Mr. Cooke shows that these contributions, which amounted in no single year during the period 1901–1911, to less than a quarter of a million dollars, were assessed regularly twice each year for the city committee and half as much for the ward committees, regardless of the existence of a contest for election. In some years it is believed that, from the excess of receipts over expenditures, subscriptions were refunded to various unofficial contributors out of this fund collected from municipal officeholders.

A conference on city and town development in Massachusetts was called for April 4, by Governor Walsh to secure information and practical suggestions for the benefit of the 105 communities of the State. It is hoped that some concerted action will be taken for furthering the civic achievement and industrial progress of all the municipalities in the State. The conference will discuss methods of securing these benefits without burdensome and unnecessary increase in taxation.

Baltimore has a municipal bureau of information and complaints—a comparatively new institution in city affairs. The bureau of information will keep on file, and will supply whenever asked, all data concerning functions, duties, personnel, and lines of division of the different city departments. The bureau of complaints will receive all complaints against the various organs of city government, it will record and distribute them to the proper body, and will, in a general way, see to the satisfying of complainants as well as making certain that there has been proper ground for the more or less indefinite grievances which are so frequently brought forward against a city.

"Some Things You Should Know About Your City Government" is the title of a pamphlet of sixty-four pages embodying a series of practical talks on Baltimore which were given before the Women's

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Civic League during the year just past. The addresses covered such topics as the framework of the city government, making the budget, the water and sewerage systems, the new paving, keeping the city clean, and the city's health. These subjects were treated by the different city officials concerned, and the whole pamphlet forms a useful compendium of information relating to the city of Baltimore.

The second annual meeting of the Chamber of Commerce of the United States was held in Washington on February 11–13. The membership of this national body now consists of 488 organizations, every State and territory save New Mexico being represented, as well as Hawaii, Porto Rico and the Philippines. The American Chamber of Commerce of Paris and the American Chamber of Commerce of the Levant are also members.

On March 9 there was a meeting in Detroit of the international joint commission on the pollution of the Great Lakes, for the purpose of considering drastic measures to eliminate the pollution.

The annual meeting of the American Academy of Political and Social Science was held at Philadelphia on April 3–4.

The first national efficiency exposition and conference took place on April 4–11 in New York City. The aim and purpose of the conference is to give "living expression to the increasing application of scientific methods to modern conditions and to provide an exchange and meeting place for producer and consumer." There were displays representing appliances, methods and products in the field of industrial, mechanical, governmental, educational, and household efficiency, as well as the usual conferences and illustrated talks.

The National Conference of Charities and Correction will hold its annual meeting in Memphis, Tenn., during the week of May 8–15. The Sixth National Conference on City Planning is to be held in Toronto on June 1–3.

Under the auspices of the city of Oakland, Cal., the League of California Municipalities, and the Panama-Pacific International Exposition, it is proposed to hold a World's Municipal Congress and Exposition during the first two weeks of August, 1915, in Oakland. An advisory committee composed of one representative from each of the various state organizations will arrange for the congress. Mr. P. V. Long, city attorney of San Francisco, has been selected as temporary chairman, and Mr. W. J. Locke as secretary.

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The formation of a Canadian municipal league, similar to the National Municipal League is being projected by a committee of Canadians appointed at the Toronto meetings of the National Municipal League last November. This committee is now considering the preliminary steps to organize the Canadian association. Already the plan has met with popular approval and is being widely discussed. The new league will have a more universal membership than that of the Union of Canadian Municipalities and the other specialized associations in Canada. One of the chief reasons for its formation is to prevent wholesale adoption by Canadian municipalities of the different features in city government and administration which have found favor in the United States, when it has not been definitely worked out that they will be at all suited to conditions in the Canadian cities. The league will have as its announced principle that the first essentials for the attainment of the specific reforms desired by particular organizations should be a foundation of good government, good legislation and good administration.

The Pacific-Panama International Exposition will pay a good deal of attention to municipal problems. There will be, among others, exhibits which illustrate such problems as the methods of storing and distributing water, the equipment for city sanitation, the construction and maintenance of roads for cities, towns and outlying districts, and many other phases of municipal administration which admit of a choice in solution.

A report issued in December by the Chicago bureau of public efficiency calls to notice once more the complexity of Chicago's local government. There are in that city nineteen distinct agencies of government, almost entirely independent of each other. These are as follows: the city of Chicago, the board of education, the library board, the municipal tuberculosis sanitarium, Cook County, the sanitary district of Chicago, and the thirteen park commissions. A certain degree of control is exercised by the mayor and city council over the education and library boards and the tuberculosis sanitarium, although each has its separate tax levy and organization. The three large and ten small park districts are entirely independent bodies, one from the other, each having its own authority as vested in it by the legislature, each governing its own district without regard to any other, and each with its own more or less elaborate organization and finances. In addition

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to this park administration, there is a special park commission of the city government which maintains a large number of small parks and playgrounds, most of which are situated in some other park district, thus giving two sets of governing bodies for the same purpose in the same area. There are, therefore, eighty-four park commissioners in Chicago. A bill to consolidate the park governments was passed last year by the legislature, only to be vetoed by the governor, and the matter is still in crying need of simplification.

This lack of central control over the city has of course caused a tremendous waste of money and efficiency. The ballot used is an enormously long one, and it is estimated that in the course of nine years (the period necessary to cover all terms of office) a male elector in Chicago is asked to vote for 144 different positions, covering national, state and local affairs. In fact, at the general election in the fall of 1912, there were fifty-seven officials to be voted for, including the president and vice-president, but not including the presidential electors. Not only are the city treasurer, the chief justice and thirty associate justices of the municipal court elected, but the offices of city clerk, and bailiff and clerk of the municipal court are also filled by elections. Multiplicity is the keynote, as well, in the case of the departmental government of the city, there being twenty-seven different departments, each with its departmental head. The cost of the elections held in Chicago is an item of great waste from the city's revenue, and one which has increased rapidly during late years. In 1912 the elections cost the city and Cook County nearly a million dollars; in 1914 it is estimated that the amount will be more than a million.

A committee of the National Municipal League is engaged on a revision of the *Municipal Program* which first appeared under the league's auspices a dozen or more years ago and which has long since been out of print.

The Chicago municipal reference library has undertaken the publication of a series of studies on municipal questions, intended to supply to the members of the city government information on various problems which are being considered by them. The first study is concerned with the rates of fare charged by public motor vehicles in fifteen large typical cities. The statistics compiled compare the rates in force in those cities per mile, per hour, and per number of passengers. The rate in the case of the two foreign cities cited, i.e., Johannesburg and

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London, is markedly below that in any American city. Two other earlier compilations prepared by the library concern anti-noise ordinances of various cities, and the total number of deaths from automobile accidents in cities having a population of 100,000 or over in 1910 during the period 1907–1912, with the percentage increase in the total for the year 1912 over that for 1907.

One of the latest innovations in the shape of a municipal commission is the city radium commission recently established in Berlin as an administrative bureau. The city has appropriated $60,000 to buy radium and maintain the commission, which was inaugurated in order that the city might have a supply of radium for public use since its value in medicine has become more known and there is such a scarcity of the mineral. This step taken by Berlin is of especial interest to this country in view of the recent report of the director of the federal bureau of mines. According to the report the bureau has been unsuccessful in its attempts to obtain a sufficient quantity of radium for use in the twenty or more hospitals of the public health service in the cure of cancer.

The increasing number of men who are without employment in the cities because of the present business depression has brought forward the urgent need for remedying this condition. To this end has been formed the American Association of Public Employment. The association has already conferred with a number of state labor commissioners concerning immediate steps to relieve the distress caused by unemployment, with the result that the establishment of public employment offices is now being advocated for every State and city which does not now possess one. Furthermore, it is planned to maintain a system of coöperation between the States for the exchange of information by labor-market bulletins. In this way it might be possible to transport laborers from one city to another according to the labor conditions prevaling there. In the meantime different cities are trying to deal with the unemployed in their own confines as may seem feasible. In Los Angeles a resolution has been brought forward for the appropriation of $1,000,000 to be spent in public work, and if this is adopted, it will mean that several thousand persons will have work. An estimate has been made, from various reliable sources, that at least 1000 high-grade workmen are without employment in Chattanooga. The municipal employment bureau is affording whatever relief it can, and manufac-

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turers and business men are promising more work before long. Portland, Ore., will endeavor to supply part-time work, at least to all married men for the next few months. This will be by means of emergency work in the park and engineering bureaus and in the construction of water mains. It is estimated that from 500 to 1000 men can be given from two to three days' work each week at the standard pay of $3 per day, with preference given to the men with families, and that unmarried men may secure from one to two days' employment.

Reports concerning the success achieved by various American cities in different branches of municipal operation have been unusually numerous during the last few months. The profitable operations of the municipally-owned Geary Street railway line in San Francisco appears to have made converts to the creed of public ownership of street railways, for the board of public utilities in Los Angeles has reported to the city council in favor of taking over the street car companies in the city. The present companies have not given satisfactory service. Complete municipal ownership of the new Chicago subways, including the river tunnel and tracks, is provided for in the plans of the city council's committee on local transportation. The first expenses are to be met from the city's traction fund and then permission will be sought from the state legislature to finance the extensions. In Michigan the supreme court has sustained the Verdrer home-rule bill as constitutional (passed by the legislature during its last session) and, among other things, the project for publicly operating the Detroit street railway system as voted last April in Detroit, is upheld by this ruling. Another municipality in Michigan, Bay City, is desirous of inserting in its charter a clause providing for the assumption of the street railway system of the city, either by purchase or by condemnation.

The statement made in the last issue of the REVIEW, that traffic on the Geary Street line of street railway, operated by the city of San Francisco, averaged about 1892 persons daily, is incorrect. This figure referred to the receipts for the month of October, which amounted, on an average, to approximately $1892 daily, and have remained at about the same ever since. The net profits of the road, however, will probably not continue to be as large owing to the increased expenses which must be incurred in making various repairs after the first year of operation, and to the demands which the employees of the road are beginning to make on the city as the result of the financial success which

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it has had. The employees are union laborers and thus represent a body of political influence which will probably bring about concessions on the part of the city government.

A good many cities of varying sizes and conditions have found municipal ownership of water and lighting plants a beneficial undertaking and report earnings with a good margin of net profits and, in most cases, a considerable reduction in rates. Among these cities are Lincoln and Omaha, Neb.; Knoxville, Tenn.; Providence, R. I.; Kansas City, Mo.; Topeka, Kan.; Louisville, Ky.; Eugene, Ore.; and Jacksonville, Fla., and the smaller municipalities of Macon, Mo.; Brockville and Rome, N. Y., and Woodstown, R. I.

Chicago's municipal store was started as an experiment, to sell groceries at cost to the poor and with the idea that meat and wearing apparel should be added to its stock and other branches should be opened in different parts of the city, should the undertaking meet with favor. Its sponsors now agree that the store has not proved a success from any point of view. It has not had a wide patronage, due to the fact, in all probability, that each prospective customer is rigidly investigated as to his actual financial need. Apparently persons who are not in the most extreme poverty have preferred to purchase supplies elsewhere rather than be looked upon as objects for charity, for the average daily sales of the store have been only $9.11 since its opening on February 19.

The University of Pittsburgh is to offer a course in the appraisement, valuation and rate-making of public utilities. The legal, engineering and economic aspects of the subject will be treated. At Harvard University the department of sanitary engineering will afford opportunity for training to students of municipal affairs through four new courses on municipal sanitary engineering, elementary bacteriology, demography and rural sanitation. A course of lectures on road building is now being given at the University of Tennessee, and has been adapted to the needs of city officials, road contractors and others interested in the good-roads movement. Lectures on highway construction are also given at Columbia, Wisconsin and Ohio State Universities.

The municipal reference bureau connected with the extension division of the University of Minneapolis is to issue a report on "Public

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Utility Rates Applying in Minnesota Municipalities," compiled by G. A. Gesell. The report will contain tabulations of rates charges in as many municipalities of over five hundred population as can be secured, for the different commodities furnished by public utility plants, together with all other available statistics concerning the plants. The full report will be issued shortly.

In 1912 the American Water Works Association appointed a committee to work on the tabulation of water rates in as many cities of the country as could be so gathered. The committee has investigated conditions in over four hundred cities and has made various general deductions. Chief among these is the fact that a comparison of water rates is not of great value because of the diverse circumstances affecting these rates. For instance, in about fifteen larger cities, it was found that the particularly low water rates were due to the fact that costs of laying water mains is assessed either entirely or partially against the property owner. To make a fair comparison, therefore, in cases like this, it would be necessary to add to the rate the charge for interest on the costs of laying the mains. It was also found that the average cost for house service is about $18 per year and that the average meter rates are about 23 cents per 1000 maximum and 9 cents minimum rate. The most logical rates seem, to the comn 'ttee, to be those in force in the city of New Orleans.

By the close of another year the new Catskill aqueduct will be completed and ready to be put in use. The enormous tube is now open from the Ashokan Reservoir to Flatbush, and there now remains the lining of the entire tunnel with concrete and the installation of the control apparatus in the shafts. The total cost of the aqueduct thus far is about $130,000,000.

The National Municipal League announces a new prize of $250 for the best essay on a subject in municipal government. The prize has been founded through the generosity of Hon. Morton Denison Hull of Chicago and the competition will be open to graduate students registered at any American university. The William H. Baldwin prize which the league has offered annually for some years past is open to competition among undergraduates only.

As a means of preventing the epidemics of typhoid, scarlet fever and tonsilitis which have had disastrous effects during the last few

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years in Greater Boston, Mayor Curley has caused plans to be made for a city milk station, to be used by about 150 small dealers who cannot afford to have their own pasteurization plants. This general milk pasteurization station will be situated on city land convenient to a railroad station. Although its construction cost will be large, it is thought that the amount will be offset from a purely financial standpoint by the saving in the expenses of the city hospital and the city health department. A small fee will be charged to those dealers who make use of the plant. Other municipal pasteurization stations, such as those in New York and Toronto, have been found of great benefit.

Several other cities are taking active steps to reduce their typhoid death-rate, and in Providence, R. I., the rate for 1913 was the lowest ever reached in the city. In 1884 it was 42.62 per 100,000 persons, while in the past year only 10 out of every 100,000 population died from typhoid. The rate for 1911 was 11.02 and for 1912, 11.65, while the average rate for the period from 1884 to 1913 was 24.10.

In New York an elaborate report has been made on the investigation of the typhoid epidemic last year, and the cause has been laid to the milk supply. For the year 1911 the death-rate from this disease in New York was 11.6 as compared with 6.7 in Paris and 2.5 in Hamburg. Hamburg has the lowest rate found in five of the largest European cities and Paris the highest. The state commissioner of health in Pennsylvania has declared war on the prevalence of typhoid in Pittsburgh and has called upon all officials in the city and the surrounding district to make a careful investigation of water works, filtration plants, sewers and sewage disposal plants.

The new series of monthly bulletins issued by the Michigan state board of health, of which the first number appeared in July, 1913, contain many articles of interest concerning municipal health and sanitary matters. The bulletins are published with a view to correlating the main health factors in home, school and municipal progress and each number, as a rule, is devoted to some particular phase of the health question. That for October takes up municipal health matters, social service is the subject for November, the work of public health officers for December, etc.

An important part of the training offered by the Graduate School of Business Administration at Harvard University in the course for commercial secretaries consists in laboratory work done at the Boston

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Chamber of Commerce. The students spend a stated portion of their time at the chamber of commerce in performing actual secretarial work in connection with some of the chamber's committees and in this way learn methods and routine of committee work from first-hand practice. They also come into definite contact with betterment enterprises, such as city planning, industrial relations, domestic and foreign trade, maritime affairs, fire prevention, etc. This further extension of the laboratory method of instruction in the realm of civic and municipal affairs is symptomatic of the general tendency.

The New South Wales Labour government, which has just come into power again, has pledged itself to the task of creating a Greater Sydney. Sydney will then be the third case of a capital city in the British Empire to follow the tendency which has been felt in England itself—that of enlarging the existing municipal boundaries and amalgamating the local governing bodies. A greater Cape Town has already been accomplished; a Greater Melbourne will probably become a fact at the next session of the Victorian parliament. Sydney, it is claimed, finds itself in greater need of amalgamation than her predecessors, in order to escape the evils arising from rapid growth beyond all plans and provision. In the Sydney metropolitan area there are at present 53 local governing bodies, with a membership of 563 aldermen and councilors. The city of Sydney proper comprises a small part of the whole district, and its city council has jurisdiction only over that part. On the other hand, the city plays by far the largest part in respect to taxable values, revenue, assets and liabilities, and, inasmuch as it is growing at a quick pace, the problem of readjustment is becoming ever greater. To add to the complexity, there are, besides the regular governing bodies, many statutory boards exercising control over various organs of administration, and there is municipal ownership of public utilities in some cases and private ownership in others. Given this great variety and number of public and private bodies which exercise municipal functions, it is not surprising that there has been a waste of money and effort along many lines.

It is proposed to remedy this condition by the creation of a Greater Sydney council with different powers and functions in the inner and in the outer zones. The division of zones is this: the inner zone will at first comprise 16 municipalities with an area of about 25,000 acres and a population of 340,620; the outer zone will comprise 225,618 acres and a population of 420,930. The new Greater Sydney council will have full municipal powers in the inner zone and in the outer zone it will

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exercise general supervisory and semi-legislative functions, leaving administration to the present local councils. For instance, in the matter of city planning, the Greater Sydney council will have full power both to plan and to carry out schemes in the inner zone, but in the outer it will merely indicate general plans and lines of action, leaving construction and maintenance to the existing local bodies. It is planned to increase the inner zone gradually.

So far as town planning is concerned, it might be added that there is a growing appreciation of its importance in New South Wales. Sydney already has a town planning association which is doing active work towards the promotion of civic planning, and the scheme for a Greater Sydney includes the giving of full powers to the proposed council, not only to remedy past mistakes, but to avoid making mistakes for the present and the future.

The model suburb which is being planned by the city of Cleveland is to be developed in such way that it will effect a municipal experiment in "deliberate, conscious and orderly city growth." The suburb will be located near the city on a reservation of 93 acres, and will contain 500 dwelling places. The land is to be definitely apportioned off for the development of the best sort of city life, including a fixed percentage for front-yard and back-yard gardens, for playgrounds, tennis courts, baseball diamonds, etc. The houses will be grouped into units for organized community life, and all the land is subject absolutely to community control. Such physical features as the size and shape of lots, the relation between width of streets and building height, etc., are to be definitely determined in planning the suburb.

Among the more important cities which have voted in favor of the commission form of government during the last few months are San Antonio, Texas, and Saginaw and Marquette, Mich. as well as several smaller towns in Kansas, Texas, Wisconsin and Missouri. To offset this gain, there have been about as many defeats for this form and these have, as a rule, taken place in the above-mentioned States. The city of Atchison, Kans., has just given commission government its third and most decisive defeat. After a trial of two years Gardiner, Me., is to return to its former plan of government, and Caldwell, Kan., is also seeking to abolish commission government in favor of the mayor-council plan. On the other hand the city of Buffalo is to vote on the adoption of commission government, Hartford is investigating its working in other cities, with a view to its adoption, and it has been accepted

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as a general plan in Seattle. In the latter city the people have recently elected a board of fifteen freeholders to draft a new charter along commission-government lines. This is in accord with the general recommendations of the charter committee of the Seattle municipal league and of the conference committee representing the various civic organizations, which was for a small council and a city manager.

The city-manager plan has been adopted in Collinsville, Okla., Lakeland, Fla.; Montrose, Colo.; Horicon, Wis.; and Clarinda, Iowa, although this latter place is not commission-governed but has the federal plan of administration. About a dozen towns and small cities in Texas have begun a campaign working towards the city-manager plan. Amarillo has already voted to employ a town manager and Denton will follow the same practice. The Olean city commission-manager charter bill has unanimously passed the New York assembly. The bill provides for five commissioners, subject to recall, and a city manager to act as administrative head of the city. No salaries are to be paid except to the city manager.

Report of the Transit Commissioner, City of Philadelphia (July, 1913: I, text and tables, xiv, 267 pp.; II, maps and plans, 1 to 69). This report is extremely well prepared and printed. It deals with transit problems from the standpoint of civil engineering and of traffic engineering, and from that of the general relations of traffic to density of population and to housing conditions. The report points out the particular advantages to be gained in Philadelphia from more rapid transit: a benefit to the public, chiefly in time saved; a financial gain to the city from increased assessable value of real estate affected by the lines. In regard to the new lines themselves, figures as to cost of construction and maintenance are given, as well as a statement of the legislative steps which must be taken before the lines can become reality. The examples of New York, Chicago and Boston are used for purposes of comparing with the new Philadelphia plan. The report contains a great many illustrations in the shape of maps, plans and diagrams.

Municipal ownership of lighting plants as applied to small towns, with especial reference to Massachusetts, is dealt with in the *Report of the Special Committee Appointed June 2, 1913, to Investigate the Matter of Municipal Lighting for the Town of South Hadley, Mass.* It contains also the report made to the committee by Mr. William Plattner, consulting engineer. Several interesting tables of statistics are given for Massachusetts towns.

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Interesting articles in the issues of *The American City* for January, February and March are the following: "How to Get Cheap Houses," by G. Frank Beer; "Recreation Facilities in Public Parks," by Edward B. DeCrott; "How to Keep the Streets Clean," by S. Whinery; "The Scope and Proper Limitations of Leagues of Municipalities," by Richard R. Price; "A List of State and Provincial Municipal Leagues;" "Commission Form versus City-Manager Plan—A Word of Caution," by Ernest S. Bradford, and "The City-Manager Plan No Novelty," by G. H. S. Gilbertson; "Refuse Disposal in Small Cities and Towns," by Samuel A. Greeley; "How the High School May Assist in Civic Development," by W. J. Hamilton; "A High School That Trains the Hand as Well as the Mind," by Henry Snyder; "Publicity in Health Work," by J. Scott MacNutt; "Using City Roofs for Public Health and Recreation," by J. Harold Braddock; "Shall Our Great Cities Be Made States?" "How to Promote the Planting and Care of Shade Trees," by J. J. Levison; "How the Raker Act Affects Hetch Hetchy, San Francisco and the Rest of California," by Martin S. Vilas; "How to Facilitate Intercourse between City and Country," by E. W. James; "A 'Clean-up' Campaign Which Resulted in a 'Keep-Clean' Ordinance," by Gustavus A. Weber; "Civil Service for Private Employment," by John F. Kavanagh; "The City's Need, The University's Opportunity," by Herman G. James; "Real Progress in Mosquito Extermination," by L. J. Richards and Russell W. Gies; "A 'Garden City' in a Country Village," by Bessie M. Weld.

Among the recent publications in the field of municipal administration are the following: Yves Guyot, *Where and Why Public Ownership has Failed.* Translated by H. F. Baker. (New York: Macmillan, 1914, pp. 459); R. C. Huston, *The City Fathers by the City Builders* (Memphis: H. W. Dixon Company, 1913, pp. 127, $2); L. W. Bodine, *Bodine's Reference Book on Juvenile Welfare; A Review of the Chicago Social Service System* (Chicago: W. L. Bodine, 1913, pp. 221, $2); W. M. Coleman, *The People's Health. A Handbook of Sanitation and Hygiene* (1913, pp. xi, 307, $0.80); C. LaRue Munson, *The Public Service Company Law of Pennsylvania (approved July 26, 1913). Digested, Topically Arranged and Indexed* (Williamsport: Candor and Munson, 1913, pp. 75); *The Illinois Public Utility Commission Law and Municipal Ownership Law* (Chicago: W. J. Norton, 1913, pp. 200, $2); J. P. Hill and A. R. Padgett, *Annotated Public Service Commission Law of Maryland, with Rules of Commission and Forms* (Baltimore: M. Curlander, 1913, pp. viii, 212, $3); L. E. Fischer, *Economics of Inter-*

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urban Railways (New York: McGraw-Hill, 1913, pp. 120, $1.50); F. W. Fitzpatrick and T. L. Condron, *Fireproof Construction* (Chicago: American School of Correspondence, 1913, $2); W. Goldsmith, *Public Works Inspection: Rules, Regulations and Civil Service Catechism* (New York: Schreiber Press, pp. 48, $1.50); Philip à M. Parker. *The Control of Water as Applied to Irrigation, Power and Town Water Supply Purposes* (New York: Van Nostrand, 1913, pp. vii, 1055, $5); Walter McCulloch, *Conservation of Water* (Lyman Lectures before the Sheffield Scientific School); J. W. Hill, *Purification of Public Water Supplies* (New York: Van Nostrand, 1914); H. T. Corey, *Water Supply Engineering* (New York: Van Nostrand, 1914); J. W. Alvord, *A Report to the Mayor and City Council on Flood Protection for the City of Columbus, Ohio* (Columbus: The Pfeifer Press, 1913, pp. 325); P. T. Farwell, *Village Improvement* (In the Farmer's Practical Library. 1913, pp. xi, 362, $1); C. B. Purdom, *The Garden City; A Study in the Development of a Modern Town* (New York: Dutton, 1913, pp. xii, 330, $3.50); National Conference on City Planning, *Proceedings of the Fifth National Conference, Chicago, May 5–7, 1913* (pp. 275, $2); Annals of the American Academy of Political and Social Science, *Housing and Town Planning* (edited by Carol Aronovici. Philadelphia: January, 1914); A. Guenther, *Die kommunalen Strassenbahnen Deutschlands* (Jena: G. Fischer, 1913, pp. iv, 124, 5M.); P. Nitze, *Die Entwicklung des Wohnungswesens von Gross-Berlin* (Berlin: Heymann, 1913, pp. vi, 131, 3M.); A. Skalweit, *Die Wohnungszustände in den deutschen Grossstädten und die Möglichkeit ihrer Reform* (Berlin: Wilhelm Ernst, 1913, pp. 23, 1.20 M.); *Statistisches Jahrbuch der Stadt Berlin. 32 Jahrgang. Enthaltend die Statistik der Jahre 1908 bis 1911, sowie Teile von 1912* (Berlin: Stankiewicz' Buchdruckerei, 1913, pp. xxiv, 1018); *Die Praxis der kommunalen und sozialen Verwaltung. 1. Die soziale Fürsorge der kommunalen Verwaltung in Stadt und Land* (Tübingen: Mohr, 1913, 7.25M.); R. Williams, *The First Year's Working of the Liverpool Docks Scheme* (London: P. S. King, 1913, 2s. 6d.); Professor Haverfield, *Town Planning in Ancient Times* (London: Clarendon Press, 1913, 6s.); A. C. Houston, *Studies in Water Supply* (London: P. S. King, 1913, 5s.); *Year Book of Social Progress for 1913–14; Being a Summary of Recent Legislation, Official Reports and Voluntary Efforts with Regard to the Welfare of the People* (London: Institution for Social Study); *The Gas World Year Book for 1914.* Edited by John Douglas (London: Offices of *The Gas World*, 1914, 7s. 6d.).

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NEWS AND NOTES

Personal and Bibliographical[1]

EDITED BY JOHN M. MATHEWS
University of Illinois

Prof. Frank J. Goodnow, formerly professor of administrative law and municipal science in Columbia University, and more recently legal adviser to the Chinese Republic, has been elected president of the Johns Hopkins University in succession to Dr. Ira Remsen, resigned, and will assume his new duties in the fall.

Prof. W. M. Daniels, formerly head of the department of history, politics and economics at Princeton University, and more recently a member of the New Jersey state public utilities commission, has been appointed by President Wilson a member of the interstate commerce commission.

President Harry Pratt Judson, of the University of Chicago, has left for China as the head of a special commission sent by the Rockefeller Foundation to examine health conditions and sanitation there and report upon the advisability of establishing a college of medicine designed particularly to promote the public health in the Chinese Republic.

Prof. John Bassett Moore, after serving one year as counsellor of the state department under the Wilson administration, has severed his connection with the department, and will continue his work for the Carnegie Endowment for International Peace and later resume his connection with Columbia University. In his place, President Wilson has appointed Mr. Robert Lansing, of New York, who served as counsel in the arbitration at The Hague in 1909 of the North Atlantic Coast fisheries case.

[1] In the preparation of book notes, assistance has been received from Prof. J. W. Garner and others.

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Dr. S. K. Hornbeck, formerly of the department of political science at the University of Wisconsin and for the past four and a half years professor in Chinese government schools at Hangchow, China, and Mukden, Manchuria, has accepted a position as assistant professor in the department of political science at Madison. He has charge of the courses in international law and oriental politics.

Prof. Frederic A. Ogg, until recently associate professor of history at Simmons College, has been appointed to an associate professorship at the University of Wisconsin.

Prof. Isidor Loeb, of the University of Missouri, has been appointed a member of the committee of twenty-five to take steps for the formal establishment of the National Association of College Professors.

President Hadley, of Yale University, delivered a course of lectures at Oxford University this spring on "The Institutions of the United States."

Mr. Felix Frankfurter has been appointed to a professorship in the faculty of the Harvard Law School.

Prof. A. B. Hart, of Harvard University, has been selected as the next exchange professor to the University of Berlin, his term of service falling in the second semester of next year.

During the past year, Dr. Shosuke Sato, of the Tohoku Imperial University of Japan and the second Japanese scholar to visit this country on the American-Japanese exchange professorship foundation, has visited a number of American Universities and delivered lectures in the interest of international understanding and peace.

President A. T. Hadley of Yale University delivered a course of lectures at the University of Virginia during April on the Barbour-Page Foundation. His subject was "Some Problems of American Democracy."

Prof. Howard B. Woolston, of the College of the City of New York, has been on leave of absence this year in order to take charge of the minimum wage investigation for the State of New York. During his

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absence his work has been given by Prof. Maurice Parmalee, of the University of Missouri.

Prof. L. S. Rowe, of the University of Pennsylvania, will be on leave of absence next year and will take an extended trip through the principal countries of South America.

Prof. Wm. H. Taft, of Yale University, gave a series of four lectures at Amherst College this spring on the Henry Ward Beecher Foundation. His subjects were "The Signs of the Times," "The People, the Constitution, and the Courts," "The Executive Power" and "The Monroe Doctrine."

On leave of absence during the second half of the present academic year are Profs. C. A. Beard of Columbia University; E. S. Corwin of Princeton University, and A. R. Hatton of Western Reserve University. During the absence of Professor Hatton, his work is being given by Prof. F. W. Dickey.

Prof. Jesse S. Reeves of the University of Michigan is one of the collaborators engaged in the preparation of an historical atlas of the United States, under the auspices of the Carnegie Institution.

The Dodge lectures on the "Responsibilities of Citizenship," at Yale University, were given this year by Mr. George McAneny of New York City. These lectures will be given next year by ex-Congressman Samuel W. McCall of Massachusetts.

Dr. E. Dana Durand, of the University of Minnesota, has been appointed to take charge of the work of the Minnesota efficiency and economy commission, in making recommendations for improving and reorganizing the state government. During April, Dr. Durand delivered a course of lectures at Harvard University on the general subject of trusts and combinations.

Prof. J. A. Brindley has been appointed head of the department of political science and economics at Iowa State College.

Prof. C. S. Potts, of the school of government of the University of Texas, has been appointed assistant dean of the department of law at

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that University. His place will be filled by the addition of a fnll professor to the staff of the school of government next year.

Henry J. Peterson, of the department of government in the Iowa State Teachers College, has been spending a year's leave of absence in the University of Iowa where he is a candidate for the doctor's degree in June. He will return to the Teachers College during the summer session as assistant professor of government.

The department of government in the Iowa State Teachers College will offer two additional college courses during 1914–15, one in American political parties and party government, and the other in local government. The department now offers eleven college courses.

Prof. E. C. Stowell, of Columbia University, has been elected to the executive council of the National Civil Service Reform League. He is preparing a volume on the law of reprisals, which will be published towards the close of the academic year.

Prof. Herman G. James, of the school of government of the University of Texas, and one of the associate editors of the *National Municipal Review*, has been appointed a member of the committee on a municipal program of the *National Municipal Review*.

Mr. Arthur W. Dunn, formerly secretary of the City Club of Philadelphia, and more recently connected actively with the National Municipal League in its investigations in the field of civic education, is conducting a similar investigation under the bureau of education. He has been visiting a number of educational institutions for the purpose of collecting material for a number of bulletins which the bureau of education will shortly publish on the general subject of civic education.

Mr. J. A. Lapp, of the bureau of legislative information, Indianapolis, has been appointed by President Wilson a member of the commission to investigate the subject of national aid to vocational education and report a plan to Congress.

Prof. J. S. Young, of the department of political science of the University of Minnesota, has been appointed a member of the minimum wage commission of that State.

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Prof. J. S. Shapiro, of the College of the City of New York, has in preparation a volume on social and political conditions in contemporary Europe.

Dr. M. N. Orfield, of the University of Minnesota, has been appointed secretary of the bureau of public affairs of that institution.

In connection with its survey of the social and industrial progress of the United States, the National Civic Federation has recently appointed a committee to investigate and report on the subject of "free speech and public assembly." Judge Alton B. Parker is chairman of the committee.

At the request of the committee on legal education and bar admission of the American Bar Association, the Carnegie Foundation for the Advancement of Teaching has decided to undertake an investigation into the conditions under which instruction in law is given in the United States.

A department of political science has been created at the Indiana State University, with Prof. A. S. Hershey as head. It is proposed that the work in political science hitherto given in the departments of history and political science and of economics and sociology by Professors Hershey, Woodburn, Bates and Lapp shall be brought together in the new department. For the present this will involve no additions to the teaching staff, but merely a reorganization of the present force.

A movement to strengthen the department of public law in the Columbia University summer school is evidenced by the courses offered for 1914. Professor Powell will give courses in American constitutional law; Professor McBain, courses in American federal government and American party government; and, at the suggestion of the Carnegie Endowment for International Peace, courses will be given for the first time in international law and the history of American diplomacy (Prof. E. C. Stowell).

A Pan-American division of the American Association for International Conciliation has been organized under the directorship of Harry Erwin Bard. The purpose of the division is stated as that of "facilitating the development of closer intellectual and cultural relations

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between the peoples of the republic of America." Its program includes the collection and dissemination of reliable information concerning the other American republics; the encouragement of international visits of representative men and women in the United States and in other American republics; the interchange of students, instructors and professors by educational institutions; the encouragement of wider study of the Spanish and Portuguese languages in the United States and the English language in other American countries; and the maintenance of connections with other organizations and agencies for the cultivation of good understanding and good relations between the peoples of the republics of America. It is hoped that a party of American students, representative of various universities in the United States, and a separate party of professors, will be organized to visit several of the South American countries this summer.

The National Voters League has been organized with headquarters at Washington, D. C. Its object is to throw a searchlight on Congress, to let the people know what their congressmen and senators are doing, and to disseminate information to the public which cannot be obtained in other ways. Several bulletins have been issued by the league. The secretary is Lynn Haines, 829 Woodward Building, Washington, D. C.

An organization known as the American Judicature Society has been launched for the purpose of promoting the efficient administration of justice in States and cities. It is under the control of a board of directors, of which Chief Justice Harry Olson, of the municipal court of Chicago, is chairman. Other members of the board include Prof. J. H. Wigmore, of the Northwestern University Law School; Prof. J. P. Hall, of the University of Chicago Law School, and Prof. Roscoe Pound, of the Harvard University Law School. The society is at present engaged in drafting a model act intended to create an efficient judicial organization for States, with provision for a special organization suited to the needs of large cities. This act will also include such matters as the selection and tenure of judges and other agents of the judicial department. The secretary of the society is Herbert Harley and the headquarters are located at 29 South La Salle Street, Chicago.

The American Civic Alliance is preparing a symposium on the subject of what an American citizen should be and do, with the object of secur-

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ing general recognition for definite standards of civic duty. The Alliance is also undertaking to organize local civic alliances in schools, colleges and universities to promote the study and practical participation in the duties of citizenship. It may be interesting to note certain steps in this direction which have already been taken in some of our colleges and universities. Following a precedent set two years ago, the Oberlin College Civic Club has issued a pamphlet containing a statement of the records of candidates for office in Lorain County, Ohio, for the use of voters in the recent elections. The work was under the direction of Prof. K. F. Geiser of the department of political science.

In connection with the recent referendum in Vermont on the question of adopting the direct and preferential primary, the class in politics at the University of Vermont, under the supervision of Prof. G. G. Groat, issued a twenty-page pamphlet which was circulated over the State with a view to giving the voters a concise and impartial description of the actual operation and comparative merits of the direct and preferential primary and the convention system. The pamphlet was largely based upon Professor Merriam's *Primary Elections*, and Professor Ray's *Introduction to Political Parties and Practical Politics*. The referendum resulted in a large majority favorable to both the direct and the preferential primary.

A course of lectures on citizenship was inaugurated during the past year at Cornell University with the object of presenting to the students the opportunities for public service which may be open to them upon graduation. The course was established through the efforts of the alumni and alumnae associations, and was under the direction of Prof. Walter F. Willcox.

The eighth annual meeting of the American Society of International Law was held at Washington, D. C., April 22–25. The subjects discussed were the "Monroe Doctrine," "The Codification of International Law," and the "Teaching of International Law in the Educational Institutions of the United States."

The Second Conference on Legal and Social Philosophy was held at Chicago, April 10–11. The program as announced was an exceptionally interesting one, and it is to be hoped that the papers which were read and the discussions upon them will be published.

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The twentieth annual Lake Mohonk Conference on International Arbitration will be held May 27–29, Prof. John Bassett Moore presiding. The discussions will relate to the proposed work of the Third Hague Conference, the value of the Wilson-Bryan peace treaties, and generally to the promotion of international arbitration.

At the second annual meeting of the Chamber of Commerce of the United States, held at Washington in February, addresses were made by President Van Hise of Wisconsin, Mr. Louis D. Brandeis and others on the proposed interstate trade commission, and general anti-trust legislation.

The third annual meeting of the Michigan State Tax Association was held in January at Kalamazoo. Papers were read on "The Federal Income Tax Laws," "Municipal Extravagance," "Taxation of Railways," and "The Work of the State Tax Commission."

The first meeting of the Indiana State Tax Association was held in Bloomington in February. Prof. William A. Rawles of the State University of Indiana was elected president of the Association.

The National Tax Association announces the early publication of volume vii of its *Proceedings*, containing the papers read at the 1913 conference, and also a new edition of volume ii of the *Proceedings*.

The Twenty-third Annual Report of the New York Tax Reform Association, for 1913, contains a review of state tax legislation enacted during the past year.

The commission on peace and arbitration of the Federal Council of the Churches of Christ in America has issued a bulletin containing two addresses by Prof. S. L. Gulick of Doshisha University, Kyoto, the one dealing with the proposal that immigration into the United States should be limited to 5 per cent, annually, of those already naturalized, with their American-born children, the other presenting a summary statement of the points made in Professor Gulick's recent volume on *The American-Japanese Problem*.

The first issue of *The Political Quarterly*, an important new journal devoted to political and social studies, made its appearance in February.

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It is under the editorial direction of Prof. W. G. S. Adams of All Souls College, Oxford, England, and is published in very attractive form by the Oxford University Press. The first number sets a high standard. That the new review does not confine itself merely to English political and social developments is indicated by the publication in the first number of an article on "The Amendment of the United States Senate," by Senator Henry Cabot Lodge. Other leading articles deal with "The Home Rule Situation," "Municipal Government in Birmingham," and "The State in Recent Political Theory." There is also a review of politics and public administration in the United Kingdom and Canada during 1913, and a department of book reviews.

The Annals of the American Academy of Political and Social Science for March consists of a symposium of descriptive and critical papers on "Reform in the Administration of Justice." The *Annals* for May will contain the papers read at the recent annual meeting of the Academy held for the discussion of the international relations of the United States with special reference to Latin-America.

Beiheft Nr. 13 of the *Archiv für Rechts- und Wirtschaftsphilosophie* is a study by Karl Strupp, entitled "Die internationale Schiedsgerichtsbarkeit (Berlin: Dr. Walther Rothschild, 1914, pp. 101.)

James Bryce has published as a separate book the two essays, originally included in his *Studies in History and Jurisprudence*, dealing with The Ancient Roman Empire and the British Empire in India" and "The Diffusion of Roman and English Law Throughout the World" (*The Roman and the British Empires*, Oxford University Press, 1914, pp. 138).

A second edition of J. A. R. Marriott's *English Political Institutions* has appeared (Oxford: The Clarendon Press, 1913). A number of minor corrections and changes have been made, and the text of the parliament act of 1911 has been added in an appendix.

Two state financial histories recently issued are *The Financial History of New York State from 1789 to 1912*, by D. C. Sowers (Columbia University Studies, vol. lvii, no. 2, 1914, pp. 346), and *A Financial History of California*, by W. C. Fankhauser (University of California Publications, vol. 3, no. 2, 1913, pp. 307). Chapter VII of the latter work

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contains an account of the movement in California toward the separation of the sources of state and local revenue.

Among recent handbooks on state government may be mentioned *The Government of Iowa*, by F. E. Horack (New York: Scribner, 1913, pp. 216), and *Actual Government in Illinois*, by Mary Louise Childs (New York: Century Company, 1914, pp. 224).

"The Legislative Reference Bureau as a Factor in State Development" is the title of a paper by A. E. Sheldon, director of the Nebraska legislative reference bureau, read at the meeting of the National Association of Conservation Commissioners at Washington last November, and reprinted in *Special Libraries* for January. A paper, on "The Place of Legislative Reference Bureaus in Government," was read by Prof. C. S. Potts, director of the legislative reference bureau of the University of Texas at the first annual meeting of the League of Texas Municipalities, and has been published in the proceedings of the league.

Special Libraries for January contains a list of references on state supervision and administration of charities and correction, supplementing a similar list published in the same periodical for April, 1911.

The Woman's Auxiliary of the National Civil Service Reform Association has issued the third edition of its *Bibliography on Civil Service Reform and Related Subjects* (1913).

The Macmillan Company has issued a fourth edition of Kirkbridge and Sterrett's *The Modern Trust Company: Its Functions and Organization* (New York: 1913, pp. 319). The work has been brought up to date and the bibliography rearranged and amplified.

The Year Book of the United States Brewers' Association (New York: U. S. Brewers' Association, 1913, pp. 312) contains a convenient summary by States of legislation, enacted and pending, relating to the manufacture and sale of intoxicating liquors. The volume contains also discussions of the economic, physiological and social effects of liquor consumption.

A new and revised edition of Beard's *Readings in American Government and Politics* has appeared from the press of the Macmillan Com-

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pany (New York: 1914, pp. 638). The text has been brought more nearly to date by the addition of extracts from the national party platforms of 1912, and selections illustrating presidential primaries, changes in the procedure of the house of representatives, the recall, and the recall of judicial decisions. The text of the Constitution of the United States containing the two recently adopted amendments has also been included.

Notes on Politics and History, by Viscount Morley (New York: The Macmillan Company, 1913), is the title of a thin volume which grew out of a lecture delivered by Lord Morley in the summer of 1912 as chancellor of the University of Manchester. It contains in brief compass much philosophic thought of this leading British scholar and statesman regarding the chief elements of politics and the various kinds of historical writing.

Prof. Lewis H. Haney's *Business Organization and Combination* (Macmillan's) will prove useful to those readers who wish to have in a single volume, and that not over-large, a complete discussion of the corporation and the trust. The author shows skill in compressing much material into a small space, but has been obliged to deal with certain parts of the subject in an extremely cursory manner. His treatment of the evolution of the various forms of business organization, for example, is so meager as to be almost worthless.

In his little book, entitled *The New Agrarianism* (Putnam's, 1913), Mr. Charles W. Dahlinger endeavors to prove that the greater part of the political and economic evils now existent in the United States are traceable primarily to retarded agricultural development. As hints to the solution of the problem, he gives brief accounts of what has been done in England, Germany and Denmark for the improvement of agricultural conditions.

Mr. Charles P. Williams, of the St. Louis bar, has published in pamphlet form the *Lectures on Federal Jurisdiction* (St. Louis, 1913, pp. 139) delivered by him before the law school of Washington University. The authorities upon the statements contained in the text are cited in the footnotes, and thus the work constitutes a textbook upon this important topic of federal jurisprudence. It remains, however, a treatise for the student rather than the practitioner. The author notes

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in his preface that, owing to pressure of other work, he has not been able to deal with practice in equity, federal criminal law or admiralty law.

Two bibliographies on woman suffrage have recently been issued by the International Woman Suffrage Alliance and the National Equal Suffrage League respectively. They are sold by the National American Woman Suffrage Association, 505 Fifth Avenue, New York City.

The useful series of reports issued by the United States bureau of corporations on the taxation of corporations in various groups of States has been supplemented by the issuance of a special supplementary report on the subject covering the tax movement throughout the United States during 1912.

A new edition of Prof. A. V. Dicey's *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* will be published shortly by the Macmillan Company. Professor Dicey has added an introduction covering the recent developments of his subjects. Among other new editions of well-known works may be mentioned the second edition of Prof. James A. Woodburn's *Political Parties and Party Problems in the United States* (New York: Putnam, 1914) and the sixth edition of Prof. F. W. Taussig's *Tariff History of the United States* (ibid.), bringing the work to date including the act of 1913.

The Yale University Press has undertaken the publication in six volumes of Bracton's *De legibus et consuetudinibus Angliae*, edited by George E. Woodbine.

Number 17 of the Kingdom Papers, by John S. Ewart, is entitled *Canadian Sovereignty* and deals, as its title indicates, with the status of Canada in the British Empire.

A List of American Doctoral Dissertations Printed in 1912, prepared by Charles A. Flagg, has been published by the Library of Congress (Washington, 1913, pp. 106).

Selections from the Federalist, edited with an introduction by Prof. W. B. Munro of Harvard University (Cambridge: Harvard University Press, 1914, pp. 202), is a collection of the more important *Federalist* papers, designed to meet the need of college students.

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The Harvard University Press announces for early publication a collection of *Cases on Constitutional Law*, by Prof. Eugene Wambaugh, of the Harvard law school.

The Department of State of the United States, its History and Functions, by Gaillard Hunt, which has appeared serially in the *American Journal of International Law*, will be brought out in book form by the Yale University Press.

The American-Japanese Problem, by S. L. Gulick, professor in Doshisha University, Japan (New York: Scribner, 1914) contains an account of the Japanese imbroglio in California and a discussion of the general question of Japanese immigration into the United States.

Special Libraries for February contains lists of references on "Public Utilities," and "The Sterilization of Criminals and Defectives."

A bulletin on "The Recall of Judges," with a bibliography, has been issued by the extension division of the University of Kansas.

"*Legislative Procedure in the Forty-eight States*" by A. E. Sheldon and M. Keegan, is the title of a twenty-eight page bulletin, issued in January by the Nebraska legislative reference bureau. It contains useful information on the subjects of bill-drafting, methods of selecting legislative employees, methods of drawing up appropriation bills, and tabular statements of the cost of legislative sessions in various States.

War and Waste, by David Starr Jordan (London: T. Fisher Unwin; and New York: Doubleday, Page and Company, 1913), marshals a startling array of facts to show the financial, economic and spiritual folly of war and war-scares, and argues strongly for peace among nations.

A digest of widow's pension laws has been compiled and issued as Bulletin no. 4 of the legislative reference department of the North Dakota public library commission.

The State of Idaho has recently published in two volumes the *Proceedings of its Constitutional Convention of 1889*, edited by I. W. Hart, clerk of the Supreme Court. A digest of Louisiana constitutional law

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has appeared under the title *The Constitution of Louisiana of 1898*, as amended to November 1, 1913, annotated by Theodore Cotonio, of the New Orleans bar (New Orleans: Louisiana Publishing Company, 1914, pp. 500).

Judicial Interpretation of Political Theory, a study of the relation of the courts to the American party system, by W. B. Bizzell, president of the Texas College of Industrial Arts, is announced for early publication by the G. P. Putnam's Sons.

A pamphlet on "The Short Ballot" has been issued by the Civic League of St. Louis. It outlines in graphic form the need of the short ballot as applied to state and local government in Missouri.

The proposal made last year by Governor Hodges of Kansas to establish a commission form of government for that State has elicited wide comment, as is evidenced by a bulletin recently issued by the legislative reference department of the Kansas State Library on the subject of "Legislative Systems" (pp. 144). It consists of two parts, of which the first, on the unicameral system, is composed of extracts from books, magazines and newspapers, containing arguments favoring the abolition of one branch of the legislature, while the second part consists of similar extracts favoring the maintenance of the bicameral system. An extensive bibliography of the subject is appended.

In *Mexico and the United States*, by Prof. Frederick Starr, of the University of Chicago (Chicago: The Bible House, 1914, pp. 400), the author traces the history of Mexico down to the present disturbed state of affairs, and outlines the economic and social condition of the people. With respect to the present crisis, Professor Starr criticizes President Wilson's policy in some respects, but approves of his policy of non-intervention, on the ground that intervention means war.

Mr. James Schouler, after an interval of fourteen years, has added a seventh volume to his *History of the United States*, covering the Reconstruction Period (Dodd, Mead and Company, 1913). The book is avowedly a vindication of Andrew Johnson. Mr. Schouler tells us that after going through Johnson's manuscripts, now in the Library of Congress, he came to the conclusion that great injustice had been done this president, and this conviction was strongly confirmed by the

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publication of the *Diary of Gideon Welles*. He also covers President Grant's two terms. The volume is an exceedingly interesting one, and has running through it a note of personal reminiscence which is entirely pardonable in a writer of Mr. Schouler's age, who during the twelve years covered by the volume resided largely in Washington, and was a thoughtful spectator of the events of that stirring period. Mr. Schouler confirms the rather dismal view of Reconstruction which has been given by Dunning, Rhodes and other recent writers.

Houghton, Mifflin and Company have issued a two-volume *Life of Harrison Gray Otis* by Samuel Eliot Morison. The volumes contain a number of letters that are not without value to the student of early New England politics. Otis was not a great statesman, but he was a typical representative of New England Federalism. His life covers a period 1765–1848. There is a distinct need for political biographies of men of this type. Without them it is impossible to really understand the actions of the more prominent political leaders and the history of national parties.

Another biography of interest to the student of politics is the life of Thomas Ritchie, the famous editor of the *Richmond Enquirer* and later of the *Washington Union*, by Charles Henry Ambler (published by the Bell Book and Stationery Company of Richmond, Va.). Ritchie was invited by President Jefferson in 1804 to assume the editorship of the administration organ in Virginia, and for forty-one years his virile pen dominated the political life of the Old Dominion and exercised a profound influence on national politics and policies. So great was his influence that President Polk, shortly after the beginning of his administration, summoned him to Washington to take charge of the national organ of the Democratic party. Dr. Ambler's volume is too much of a running commentary on Ritchie's editorials. It does not give as illuminating an account of the politics of the Old Dominion as one would expect in the life of a man who played as important a rôle as Ritchie. Nevertheless, the volume has a distinct value.

G. E. Stechert and Company of New York have recently issued a volume entitled *Recent Developments in China* (Clark University Addresses, November, 1912), edited by George H. Blakeslee, containing addresses on different phases of the Chinese question by more than twenty experts. Some of the addresses are of very great interest, and

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from the volume as a whole one gains a large amount of valuable information in regard to the causes of the Chinese Revolution and a clearer insight into the problems now demanding solution.

Mr. Albert H. Walker, of the New York bar, is the author of two interesting pamphlets dealing with the federal income tax law, the one entitled *The Income Tax Law Analyzed and Classified* (pp. 132), in which the pamphlet of Luther F. Speer is severely criticized, the other entitled *The Unconstitutional Character and Illegal Administration of the Income Tax Law* (pp. 89), in which it is argued that the law is confiscatory in that provision is made for the collection at the source of incomes from persons who are not liable for the tax; that it compels the debtor companies or persons to act as agents of the government for the collection of the tax, and that it applies to incomes obtained prior to its enactment of the law. The pamphlets are published by the author at Park Row Building, New York City.

The series of lectures delivered in 1913 on the Page Foundation at Yale University has been brought out in book form under the title *Questions of Public Policy* (Yale University Press, 1913, pp. 134). It consists of papers on "The Character and Influence of Recent Immigration," by Jeremiah W. Jenks; "The Essential and Unessential in Currency Legislation," by A. Piatt Andrew; "The Value of the Panama Canal to this Country," by Emory R. Johnson; and "The Benefits and Evils of the Stock Exchange," by Willard V. King. The authors of these papers are recognized authorities on their respective subjects, and the papers themselves are written in an interesting style, with the needs of the general reader in mind. In his paper on the Panama Canal, Professor Johnson brings out a fact not generally appreciated, namely, that only about one-fifth of the total traffic carried by the transcontinental railroads to the Pacific coast originates east of the Allegheny Mountains, and that the opening of the Canal, therefore, cannot be expected to have a great effect upon the rates charged by the transcontinental railroads.

Bureaucratic Government, A Study in Indian Polity, by Bernard Houghton, a former official in the civil service of India (London: P. S. King and Son, 1913, pp. vi, 200), is mainly a criticism of the existing administrative system by which India is governed and a suggestion of the remedies. The principal thesis of the author is that the English

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are confronted by a crisis in India, the chief cause of which is a hateful bureaucracy, the "most perfect of its kind in the world," and one which is "undermining the whole structure of British rule" and fomenting insurrection. The remedy consists in reforming the system root and branch and in introducing on a more extended scale the elements of popular government. The reforms introduced by Lord Morley through the establishment of advisory councils have produced, he says, excellent results and they should be extended and a larger degree of local self-government introduced. In all the councils there is too large a proportion of "official" representatives and too few "non-official" members.

The system of provincial councils, we are told, "holds the touchstone of success;" from these and not from that of the viceroy, the Indian parliaments of the future are to spring. These councils should be given a larger power of legislation and that of the viceroy restricted to those subjects which concern directly or indirectly foreign powers or in which uniformity of procedure throughout India is really essential. In short, "The keynote of all progress lies in the transfer of power from the bureaucracy to men unwarped by official bias and more in sympathy with popular aspirations."

Taxation and the Distribution of Wealth, by Frederic Mathews (New York: Doubleday, Page and Company, 1914, pp xvi, 680), is the title of an ambitious work, in which the author, starting with a description of the causes and effects of the protective tariff and of various forms of taxation, is led very far afield into the ramifications and by-paths of his subject and related subjects. He brings within the field of his observation various systems of art, religion and philosophic thought, both of ancient and modern times, and quotes a wide range of authors, from Epictetus, Plutarch and Lactantius down to Roosevelt and Lincoln Steffens.

The Fall of Protection, by Bernard Holland (London and New York: Longmans, Green and Company, 1913, pp. xi, 372), is the title of a recent work in which the author of *Imperium et Libertas* gives us a well-rounded and, in the main, a trustworthy account of the political events in England between 1840 and 1850 which led to the repeal of the corn laws and the adoption of the free trade principle. In the last two chapters, he outlines the present situation and supports the position that there should be a wise and moderate change in the existing system by returning to a reasonable degree of protection of British industries from unfair competition.

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Commission Regulation of Public Utilities, published by the National Civic Federation (New York, 1913, pp. 1284), is a "compilation and analysis of the laws of forty-three States and of the federal government for the regulation by central commissions of railroads and other public utilities." Among the heads under which the provisions of the laws are classified may be mentioned the organization and powers of commissions, rate making, service, accounts, franchises, enforcement, stock and bond issues, intercorporate relations, and commission procedure and practice. The work was carried on by a committee of the Federation, of which Emerson McMillin was chairman, and Prof. John H. Gray, of the University of Minnesota, was the director of the investigation. Such a work as this is fundamental to the thorough study of the legal regulation of public utilities, and students of this subject are under obligations to those who have undertaken the work and carried it to completion.

Where and Why Public Ownership has Failed, by Yves Guyot, translated from the French by H. F. Baker (New York: The Macmillan Company, 1914, pp. 459), is the work of a man of very decided opinions upon the subject of governmental and municipal ownership. He starts out with the sole ostensible object of presenting a compilation of authentic facts and figures regarding public ownership and operation. Those which he has collected cover a wide range, and are drawn from most of the important countries of Europe and from New Zealand. He compares public and private ownership from the standpoint of bookkeeping and finance and also from that of various administrative results, such as the safety of travelers, disorders, delays and errors. The facts which he selects point strongly to the superiority of private ownership, but the strength of his argument is somewhat lessened by the tone of the book, which is distinctly partisan. There is not only a need of authentic facts upon this subject, but also a need of calm consideration of them.

Dr. O. W. Krauth, in a monograph entitled *The Policy of the United States Towards Industrial Monopoly* (Columbia University Studies in History, Economics and Public Law, vol. lvi, no. 2, 1914, pp. 230), gives a clear presentation of the subject from a legislative and judicial point of view. The formation of the policy leading up to the enactment of the Sherman act of 1890, and the history of federal anti-trust legislation since that date, are described, and an estimate made of the views and policies of the administrations of Harrison, Cleveland, Mc-

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Kinley, Roosevelt and Taft. Then follows a chapter of eighty pages analyzing briefly the decisions of the Supreme Court which have dealt with the constitutionality and construction of the federal anti-trust laws. The study is concluded with an analysis of government policies which is divided into two parts: the one considering the questions, what kind of combinations have been forbidden, and why; and the other, the methods of treating combinations. In his preface the author says: 'Should this book give the reader a clearer understanding, in the light of history, of the policies to be adopted during the present administration, its purpose will be accomplished." This aim the study certainly fulfils.

The appearance of a revised edition of Sidney Low's *The Government of England* (New York: Putnam's, 1914, pp. 320) is very welcome, for the work still remains the best and clearest account within very moderate compass of the actual working of parliamentary institutions in England. In addition to revising the text throughout the work, the author has supplied an introduction in which are noted the more important developments and constitutional practices since the book was first published fourteen years ago. Here he calls especial attention to the fact that the operation of the act of 1911 abridging the power of the house of lords as an upper legislative chamber will be dependent upon the reform which all parties agree is soon to be made in the composition of that body.

That the influence and importance of the prime minister is increasing is also emphasized. He is attaining the attributes of an imperial chancellor and having thrust upon him duties to which it is not practicable that the collective responsibility of the cabinet should be applied. As to home rule for Ireland, Mr. Low repeats his conclusion earlier stated that some system of subordinate legislatures, some devolution of authority on a large scale is required in order that the central parliament be released of the burdens of legislation which are now beyond its strength. In the house of commons the aristocratic element is declared to be declining and the plutocratic influence increasing.

To the growing American literature on workmen's insurance is added the volume by I. N. Rubinow, chief statistician of the Ocean Accident and Guarantee Corporation, entitled *Social Insurance, With Special Reference to American Conditions* (New York: Henry Holt and Company, 1913, pp. vii, 525). Notwithstanding his connection with the

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insurance business, the author has made but slight attempt to consider the actuarial problems involved in organizing financially sound insurance institutions. Neither has he attempted to describe and criticize insurance institutions as built up in foreign countries except as such systems are considered by way of illustration. Essentially the work is a study in the field of social economics, and its importance lies in showing the necessary part that efforts in this field, not only are taking, but from the nature of the problem must take, if the condition of the masses is to be permanently improved. The work is divided into five parts, dealing respectively with: the general concept and problem of social insurance, insurance against industrial accidents; insurance against sickness; insurance against old age, invalidity and death; and insurance against unemployment.

The Mechanics of Law Making, by Courtenay Ilbert, clerk of the house of commons (New York: Columbia University Press, 1914, pp. xiii, 209) contains the Carpentier lectures delivered by the author at Columbia University in October, 1913. Sir Courtenay reviews the history of bill-drafting in England and describes the origin and functions of the parliamentary counsel to the treasury. Separate chapters are devoted to "Rules for the Guidance of Draftsmen," "Forms of Legislation," "Codification" and "The Study of Comparative Legislation."

Les Jeunes Délinquants, by Hassan Nachât (Paris: Arthur Rousseau, 1913, pp. 410), is a description and discussion of the systems adopted in England, France and Egypt for the treatment of the youthful offender. The author is decidedly opposed to the idea of punishing young criminals. He does not, however, advocate their reformation but rather the formation in them of the proper spirit and the desire to become honest members of society. Only through education and training of a positive character can this result be brought about. The book is supplied with a number of illustrations showing existing methods of dealing with young criminals.

La Protection Légale des Travailleurs aux États-Unis, by E. Dewavrin and G. Lecarpentier (Paris: Marcel Rivière, 1913, pp. 348), is dedicated to M. Levasseur, whose early work on the American workman it supplements and brings down to date. It considers the legal provisions in this country relating to such subjects as the labor contract, length of working day, wages, hygiene and security of labor, regulation of sweat

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shop labor, accidents, protection of women and children, etc., and compares these provisions with the corresponding French legislation.

A new volume in the American Casebook Series, edited by Dr. James Brown Scott, is Prof. James Parker Hall's *Cases on Constitutional Law* (St. Paul: West Publishing Company, 1913, pp. xxxii, 1452). The volume is somewhat larger than that of McClain's Casebook, and, of course, has the advantage over that compilation of being able to include a number of the more recent cases. Both collections are designed for use in law schools employing the case method of instruction. In aim, however, the two volumes are not quite the same. Judge McClain has in view the provision of material for study whereby the fundamental principles of our constitutional jurisprudence may be determined and comprehended. Professor Hall's aim is to provide the means whereby the student may obtain a knowledge of the substantive principles of constitutional law which will qualify him for admission to the practice of the law. Thus his cases cover more details of our federal jurisprudence but leave untouched, or meagerly represented, the more general principles. This difference in scope largely explains the fact that very many more cases are represented in Professor Hall's volume than are given in Judge McClain's collection. Judge McClain's footnotes consist almost wholly of synopses of cases related to those given in the text, and to dissenting opinions. Professor Hall's footnotes contain much valuable explanatory matter as well as references to cognate cases. It would have greatly added to the value of Professor Hall's volume if he had followed the plan of Judge McClain of enumerating in the table of contents the principal cases illustrating each sub-topic. As it is one can ascertain what cases are given under any head only by turning the leaves of the chapter.

In his *Privileges and Immunities of Citizens of the United States* (Columbia University Studies, vol. liv, no. 1, 1913, pp. 94), Dr. A. J. Lien undertakes to arrive at a definition of such privileges and immunities through an examination of the decision of the courts, principally of the Supreme Court, with some sidelight drawn from the congressional debates upon the adoption of the fourteenth amendment. His conclusion is that the dual character of citizenship in the United States is the result of the existence of two coördinate governments, and the two citizenships correspond in extent and limitations to the powers of the respective governments from which they arise. The privileges and im-

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munities of citizens of the United States are those "which arise from the powers conferred upon the national government, which are completely protected by that government, and which are enjoyed by the individual because he is a citizen," while the fundamental individual rights of life, liberty and property are not privileges and immunities of citizens of the United States (pp. 80, 81). This contention has, in fact, been pretty well established since the decision in the Slaughter House Cases. Much of the ground over which the author treads has already been covered by earlier monographs, and he adds little new light to the subject, but the book may serve as a useful summary of the leading cases on this topic. In enumerating examples of privileges and immunities of citizens of the United States, as established by the courts, he includes "exemption from race-discrimination," and cites the cases of United States vs. Reese and United States vs. Cruikshank (p. 81). In this general form, however, the statement is misleading, since these cases are authority for the exemption from race-discrimination only in the matter of voting. An appendix contains a list of leading cases and authorities.

RECENT DECISIONS OF STATE COURTS ON POINTS OF PUBLIC LAW

Direct legislation—referendum. Meade vs. Dane County. (Wisconsin, February 3, 1914. 145 N. W. 239.) A statute provides that no ordinance of a county board shall go into effect within twenty days from the date of its passage and that within that time a petition may be filed for the submission of such ordinance to the referendum of the voters, upon whose disapproval the ordinance shall stand repealed.

Held that this provision is unconstitutional since it covers ordinances of an administrative character in which the county board exercises quasi-judicial functions, as for instance, in allowing claims against the county. The decision also holds that since the constitution recognizes the county board as the governing body of the county its legislative powers may not be delegated to the voters and that a referendum is in effect such delegation.

Parliamentary law—delegation of power to minority. Rawles vs. Wyand. (Oklahoma, January 13, 1914. 138 Pac. 158.) By concurrent resolution which became effective on June 30, 1913, the two houses of the legislature directed an adjournment to July 5. On that day after the roll call of each house, if it should appear that a quorum had not

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appeared in either house the presiding officers should immediately adjourn their respective houses without day. On July 5 less than a quorum appeared in either house and the speaker of the house declared an adjournment without day.

It was held that the session closed on June 30 and not on July 5 for there was no valid session after that day, the houses being unable to delegate their powers either to a minority or to the presiding officers.

Since referendum petitions must be filed under the constitution not more than ninety days after the final adjournment of the session and since in the present case the petition was filed on October 2, it was held that there was no valid petition for a referendum.

Administrative departments—delegation of power. State vs. Taylor. (North Dakota, December 29, 1913. 145 N. W. 425.) A statute establishes a state bonding department under the management of the commissioner of insurance for the purpose of bonding municipal corporations against losses by default of their officers. The act fixes a flat rate of premium at 25 cents for $100 worth of bonds per year, to be paid by the proper authorities to the state treasurer, the minimum premium not to be less than $2.50. The insurance commissioner is to estimate each year the amount required for salaries and expenses of the department and to reserve such amount from the premiums received.

It is held that this last provision renders the act unconstitutional since a separation of the fund into two parts, one for the payment of expenses and the other for the payment of losses, is a legislative act which the legislature may not delegate to the insurance commissioner.

It is held also unconstitutional as delegating to the insurance commissioner the determination of questions of both fact and law relating to the cancellation of bonds and to the payment of losses through the violation of duties of the officials included in the act. There is no method available under the statute by which claims on the part of municipalities against the bonding fund can be judicially enforced.

Delegation of power. Sheldon vs. Hoyne. (Illinois, December 17, 1913. 103 N. W. 1021.) A statute requiring the installation of gas safety appliances exempts buildings in which the total volume of gas introduced is not more than the average volume delivered through a $\frac{3}{4}$-inch pipe unless the conditions under which the gas is used create a danger to life or property equal to that caused by a larger average volume in which case the installment is to be made in the discretion of the proper officials.

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Held that this provision renders the act unconstitutional as vesting in the official an unregulated discretion.

Police power—class legislation. State vs. Barba. (Louisiana, April 14, 1913. 61 Sou. 784.) An act forbids the employment of stationary firemen for more than eight hours consecutively in any one day in any manufacturing or office building running day and night, making an exception for firemen employed in the petroleum industry, in a cotton gin, sugar plantation, or in the sawmill industry.

Held that the exceptions, and the classification upon the basis of running by night and by day, being arbitrary, the statute is unconstitutional as violating the principle of equality. The court also refers to the provision of the constitution of Louisiana that no law shall be passed fixing the price of manual labor and intimates that the compulsory shortening of hours of labor tends to diminish the wages of labor.

Personal rights—equal protection. Smith vs. Board of Examiners. (New Jersey, November 18, 1913. 88 Atl. 963.) A statute authorizes with regard to feebleminded, epileptic or otherwise defective inmates of reformatory, charitable or penal institutions, an operation for the prevention of procreation, upon the unanimous finding of a board of examiners created for that purpose that procreation is inadvisable and that there is no possibility of any improvement in the condition of the inmate.

Held that in confining the application of the remedy to those who happen to be inmates of institutions and in whose case the danger to be guarded against exists in a very slight degree as compared with those who are at large, the statute establishes an unreasonable classification and is therefore unconstitutional.

Due process—liability for accident. Eastman vs. Jennings, etc. Logging Company. (Oregon, January 20, 1914. 138 Pac. 216.) A statute may validly give double damages for injuries by fire when the injuries are the result of willful, malicious or negligent acts of the defendant. A provision, however, to the effect that if such fires were caused or escaped accidentally or unavoidably, civil action lies only for actual damages, is unconstitutional as being repugnant to the fourteenth amendment.

Due process—lien laws. Anderson vs. Great Northern Railroad Company. (Idaho, January 14, 1914. 138 Pac. 127.) A statute

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provides that any one furnishing supplies to any person engaged in cutting or manufacturing ties or lumber shall have a lien upon the same for the value of the supplies furnished.

Held unconstitutional for the reason that the lien is created irrespective of contract and without any regard to any benefit which the owner of the property may have received from the supplies furnished; and for the further reason that the law furnishes the owner of the property no notice and affords him no method of protecting himself against such claim and charges him with a claim which may equal or exceed the value of the property, although he has paid the contract price to the men who actually did the labor.

Due process—lien laws, attorney's fees. Becker vs. Hopper. (Wyoming, January 27, 1914. 138 Pac., 179.) A statute giving a sub-contractor a lien for labor and material actually entering into the structure as against an owner with whom he has no direct contractual relation, is valid. A provision, however, which in all suits to enforce such liens gives to the successful plaintiff an attorney's fee of $25, violates the guaranty of the equal protection of the laws.

The court relies upon Gulf, etc., Company vs. Ellis, 165 U. S. 150, and on Colorado and Montana decisions.

Criminal procedure. Commonwealth vs. McClanahn. (Kentucky, April 25, 1913. 155 S. W.1131.) Sustains a statute which makes it unlawful for any official to question a person in custody charged with crime by plying him with questions or by threats or other wrongful means in order to extort from him information concerning his connection with the crime, or knowledge thereof to be used against him as testimony upon his trial and renders any confession obtained by such means inadmissible in evidence.

Due process—statutory presumptions in criminal cases. Stete vs. Russell. (North Carolina, November 10, 1913. 80 S. E. 66.) A statute makes it an offense to have in possession a certain amount of liquor for purpose of sale, and declares that possession of the amount shall be prima facie evidence that it is kept for sale.

Held that this does not destroy the presumption of innocence; the jury must, in order to convict, be convinced of the guilt of the accused beyond a reasonable doubt.

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Due process—right of appeal. Cullins vs. Williams. (Kentucky, November 21, 1913. 160 S. W. 733). An act permitting the commitment of dependent children fails to provide for a right of appeal. This does not invalidate the statute since the right of appeal is purely a matter of legislative discretion. However in proper cases parties aggrieved may resort to the writ of habeas corpus or of prohibition.

Due process—summary proceedings against defaulting tax collectors. Gaulden vs. Wright. (Georgia, November 14, 1913. 79 S. E. 1125.) Civil code, sec. 1187, allows the comptroller general to issue execution against a tax collector who fails to settle his accounts with him, without providing for notice and hearing. Held unconstitutional.

A similar proceeding had been sustained by the U. S. Supreme Court in Murray's lessee vs. Hoboken Land and Improvement Company, 18 How. 272.

Equality—classification. Ex parte Lewinsky. (Florida, November 11, 1913. 63 Sou. 577.) A statute regulating the sale of intoxicating liquors may validly exempt hotels having 100 rooms or more. The court suggests that in very large hotels the bar is a mere incident, and the hotel management will, as a matter of self-protection, see to it that it is properly conducted.

Interstate comity. Newport vs. Merkel. (Kentucky, December 19, 1913. 161 S. W. 549.) An act may validly exempt non-resident owners of motor vehicles from registration and the payment of a license fee if they have complied with a similar law of the State of their residence. Such a statute supersedes an ordinance subjecting non-residents to the requirements.

Status of teachers in public schools—removal from office. People ex rel. Peixotto vs. Board of Education. (New York, Appellate Division, February 6, 1914. 145 N. Y. Suppl. 853.) The remedy of a teacher who is removed for neglect of duty is not by mandamus for reinstatement but by an appeal to the state commissioner of education. It is otherwise where the charge is one for which removal is not authorized in any event. The teacher in the present case was removed because she absented herself without leave previous to childbirth.

The court does not express an opinion as to whether necessary absence for that reason constitutes neglect of duty, but believes that there may be circumstances where absence to await the birth of a child might justify the charge.

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BOOK REVIEWS

Law as a Means to an End. By RUDOLF VON IHERING *(sic!)* Translated from the German by Isaac Husik. Modern Legal Philosophy Series, Vol. V. (Boston: Boston Book Company, 1913. Pp. lix, 483.)

First of all, in connection with this book, attention should be called to the confusion regarding the author's name, which has pursued him ever since he began to write, not in foreign countries only, but even in Germany. The true name is Jhering, pronounced "Yaring," two syllables, with the a as in "fate." In German, the printers make no distinction between capital "I" and "J," the rule being that either letter is pronounced as a vowel before a consonant, and as a consonant before a vowel. The "h" being treated as a consonant, causes those not familiar with the name to pronounce it in three syllables, and foreigners to substitute "I" for "J." But the name is not German, and follows no German orthographic principles. It is Friesian, being a patronymic derived from a personal name occurring variously in the forms Jhero, Heare and Heero (see vol. 4 of Dijkstra and Hettema's *Friesch Woordenboek*). In the present volume it is printed "Ihering" on the title page, the binder's title and the editorial prefaces, but correctly "Jhering" in the special introduction by Professor Geldart, of Oxford, and the subscription to the author's own preface.

This fifth volume of the Legal Philosophy Series has, after the general preface to the series, an enlightening preface by Professor Drake of Michigan, in which an interesting parallel is drawn between Jhering and Bentham. Next, Justice Lamm of the Missouri supreme court lightens the labors of the student by a sprightly appreciation of the author, and prepares him for the serious work ahead. First, however, there is another, very valuable introduction by Professor Geldart, and at the end of the volume are printed an article by Adolph Merkel, which appeared shortly after Jhering's death, and an extract relating to him, translated from "L'Evolution du Droit et la Conscience Sociale," by L. Tanon, president of the French court of cassation. There is thus no lack of preparation for the study of the work proper.

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Only the first volume of the original is included in the translation. This seems entirely justified; for the bulky second volume starts out to give a utilitarian theory of ethics, rather than law, and soon loses itself in all kinds of more or less interesting discussion, in which the many-sided interests of the author are displayed while the subject of the work is made but little clearer. The translation in this case is unusually well done. The text reads fluently, and almost as if it had been originally written in English. It seems to follow the text quite closely, rather than attempt something like a re-writing of whole passages, and a number of texts have furnished to the reviewer but few places where he would suggest a different translation. On pages 315, 324 and others, the word "force" hardly expresses the meaning of the German "*Gewalt.*" That term is not used here in the sense of coercion as opposed to persuasion; it connotes authority, and might be most closely rendered by power. The close following of the original, which is a decided virtue in most instances, cannot give satisfaction, however, in rendering the meaning of Roman law terms. An instance is the word for word translation of the section headings on page 204 and further on. "*Rechtsgeschäft*" is a legal transaction, not "business;" and "Zweiseitiges Realgeschäft" is not "Bilateral real business," but simply an executed contract, or at least something very much like it. No more comprehensible is the translation "effective unilateral real business;" what is meant is an executory contract with actual part performance. "Imaginary unilateral real business" is similarly an executory contract with fictitious part performance; "unilateral promissory business" is an executory contract based on mutual promises, and what the translator calls "unilateral promissory business" is something not recognized in our law—practically a contract without consideration, or a *nudum pactum,* in the common law, not the civil law sense. These examples illustrate the troubles the translator meets with in trying to render foreign law terms in English. The task is one of extraordinary difficulty, and I know of nobody who has ever accomplished it to his own entire satisfaction or that of anybody else. It does not seem as if the method adopted by Mr. Husik were the best one. Surely the literal translations cited above convey no meaning to an American lawyer. Why not forget all about the foreign technical term, and either apply to the legal concept meant thereby some English law term that will cover it with substantial equivalence; or where no such English term exists, boldly invent a new name for the thing, self-explanatory if possible, and if that is impossible, explained in a footnote?

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A few words the reviewer may be permitted to say about the work of Jhering itself. To a man with some training in philosophical thought the inclusion of this book in a Legal Philosophy Series may at first appear questionable. For with all its brilliance, lucidity, and interesting outlook on various phases of legal development, the work hardly deserves to be called philosophical. Its main thesis, that law exists for a purpose and not for its own sake, does not seem to require elaborate proof. Few people would doubt it if put before them in clearly formulated words. The inclusion of the work, however, is entirely proper when we consider the immediate practical effect it aimed at, and the further fact that the abuse it combatted on its appearance is still altogether too prevalent in the United States.

The middle decades of the nineteenth century were, in Germany, one of the culmination periods of a disease that seems to attack all legal systems at intervals. Jhering's arguments are directed against what the Germans call "*Begriffsjurisprudenz*," and what our books sometimes speak of as "scholastic reasoning." It consists in treating a legal question as if it were a problem in formal logic, disregarding entirely the practical outcome. The method of legal thought, as we well know, has always been principally deductive; that is, it begins with some general proposition, such as, let us say: A valid contract requires a consideration. Then would come a similar proposition as the minor premise: A promise to make a gift has no consideration. The conclusion must be: A promise to make a gift is not a valid contract. This syllogistic method is perfectly legitimate, and in fact quite unavoidable in law. But it needs to be controlled, step by step, by reference to the actual facts of life, in such a way that the minor premises in a chain of syllogisms must not themselves be all of them mere conclusions from preceding syllogisms, but inferences from observed facts. Let us imagine that a custom should spring up of making certain payments for some well-defined purpose, as for instance for maintaining the salary of a clergyman. These payments are commonly denominated donations or gifts, but the clergyman depends on them for his living and the donors receive for them his ministrations. Clearly there is here a perfectly sufficient consideration. Now, if a court should hold that the clergyman could not make the donors keep their promises to pay his salary, because the contributions were gifts and not enforceable, he would be guilty of the abuse in question. His conclusions would be derived from the proposition that the name donation implies the absence of consideration. But he should have looked, not to the word, but to the facts, and ascertained, by obser-

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vation and inference, whether a consideration existed or not. The method of this supposed court would suffer from the fault Jhering set himself to combat, of allowing all the links of the chain of reasoning to go unverified by induction. For the definition of a gift is a mental concept analytically derived, and not an inference from observed facts. It is the same fault against which, in a recent English case, Mr. Justice Darling uses his sarcasm, when he says: ". . . . there have been lawyers in the past so learned that they would decide any point regardless of the practical consequences of their judgments. There have been judicial cynics who held that the *argumentum ab inconvenienti* was always and necessarily bad. I do not pretend to be the equal of any of those." (Hull vs. Hackney Union, 1. K. B. 763, 1911.) The system of common law pleading, as it existed a hundred years ago, was a fine embodiment of this legal method.

In so far as the present book is directed against this pitfall of the courts, it was highly useful in Germany when it first appeared, and will be no less profitable for an American lawyer to study. If however it pretends to be a treatise explaining the fundamental nature of law, it is woefully inadequate. By much of what it says, and by still more that it omits, the work implies the notion that law is the exclusive product of commands given by rulers, with a conscious purpose to accomplish a definite end. Looking at each separate rule at the moment of its origin, whether in an act of legislation or the decision of a court, this is of course true. Few people would dispute it. If we stop there, however, as Jhering does practically, we omit all the manyfold conditions determining the nature of the rule at the moment when it is enunciated and modifying it constantly while it exists. All the material and cultural circumstances of the nation take a part in this determination and subsequent modification. The conscious making of the law, which to Jhering seems to be the beginning and the end, is only a part, and possibly not the most important part, in the process. Law is not merely made, but it grows. Undoubtedly we may have a perfect right to believe that this growth, like the act of enunciating some definite rule, is teleologically determined, but the question whether for some conscious power above legislatures and courts the law is indeed a "means to an end" leads into depths of philosophical inquiry which the lucid and brilliant disquisitions of the author do not even begin to touch.

Useful as Jhering's book may prove to the common law student, for the study of legal philosophy in any true sense he needs a very different guide.

ERNEST BRUNCKEN.

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Organized Democracy. By F. A. CLEVELAND. (New York: Longmans, Green and Company, 1913. Pp. xxxvi, 479.)

Public Opinion and Popular Government. By A. LAWRENCE LOWELL. (New York: Longmans, Green and Company, 1913. Pp. xiv, 415.)

Politician, Party and People. By H. C. EMERY. (New Haven: Yale University Press, 1913. Pp. 183.)

The interest in the working of popular government in the United States has given rise to a considerable body of literature, of which the volumes under review may be taken as representative types among recent publications. Each of these volumes approaches the subject from a somewhat different standpoint, and each, to a certain extent, supplements the others.

The most comprehensive of the three books is that of Dr. Cleveland, which is an amplification of his *Growth of Democracy in the United States* (1898), although now largely rewritten and containing much additional matter: The earlier work, as its name implies, dealt primarily with the historical development of democratic institutions rather than with their existing forms, and this characteristic has been transmitted very perceptibly to the present volume. Thus an adequate historical background has been provided, but it must be said that this very fact has, to some extent, prevented as full a discussion as might be desired of the present condition and future prospects of democratic institutions. Such a subject as proportional representation, for example, receives no attention whatever. There is also at times a noticeable tendency toward a merely legalistic style of treatment.

After the historical introduction, the author takes up in turn the principal subdivisions of the subject, including provisions for making citizenship effective, the electorate as an agency for expressing public opinions, the utilization of the electorate, and provisions for making public officers responsible and responsive. Under the head of provisions for making citizenship effective, he considers such matters as woman suffrage, primary elections, and the short ballot. He takes occasion to attack the principle of the short ballot on the ground that "no electoral plan which may be adopted will relieve the community from providing itself means of intelligence as comprehensive and far reaching as are the activities to be performed by the government whether one officer in charge is elected or several" (p. 272). It may be pertinent to point out, however, that

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the value of the simplification of the electoral machinery through such a device as the short ballot is relative to the conditions under which it is applied. Since, under present conditions, the great mass of the voters are not supplied with the means of intelligence as comprehensive as the activities of the government itself, they cannot be expected to inform themselves with regard to the honesty and efficiency of every petty public official. "Responsibility," Dr. Cleveland adds, "cannot be fixed on the appointing power in any different way than it may be fixed on the ones appointed who are in charge of departments." (*ibid*). It must be admitted, however, that responsibility can be fixed to a greater degree upon a central appointing officer that it can upon a multitude of subordinate elective officials.

Dr. Cleveland concludes his work with some valuable practical observations upon the relation of budget plans and accounting methods to the problem of democratic government, and it is to be regretted that limitations of space prevented a fuller discussion of this subject.

Somewhat more in the nature of an essay upon certain important phases of the subject rather than a comprehensive treatise is the volume which President Lowell gives us. The nucleus of the present volume consists of a series of very stimulating lectures which he delivered at the Johns Hopkins University in the spring of 1909, but much of the volume has been written more recently. President Lowell has the happy faculty of penetrating behind the shams and fictions with which the operation of political institutions is so thickly covered, and of showing us the processes of political life as they actually are. Perhaps the most striking part of the present volume is that in which he discusses in an illuminating manner the nature and sphere of operation of public opinion, and analyzes acutely the function of political parties in focusing public opinion upon the questions at issue. Unlike some writers, therefore, President Lowell finds that parties perform a useful and even necessary function in a democracy, and his discussion on this point is of positive value. At the same time, however, he admits the unreality and artificiality of party lines of cleavage.

Part III of President Lowell's book contains an interesting and discriminative account of the working of the initiative and referendum, both in the United States and in Switzerland, and in the appendix are collected very full and up-to-date statistics regarding the size of the vote on initiative and referendum propositions in the United States and also in the Confederation and cantons of Switzerland. The necessary limitations upon the efficiency of popular control are, as was to be expected,

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fully recognized by President Lowell, and in the last part of the book he shows clearly the need of expert administrators in popular government, and also the difficulties connected with securing and retaining them. On the whole, the book, although an essay rather than a treatise, is a valuable contribution to the subject.

There are some topics connected with the general subject of popular government to which Cleveland and Lowell devote little or no attention. Up to the present time, legal action of many kinds and forms has been taken in this country designed to secure as accurate a registration as practicable of the voter's opinion when he goes to the polls to vote, but as yet comparatively little has been done by governmental action to provide adequate facilities whereby the voter may be able, before he goes to the polls, to form a sound judgment upon the questions of public policy that he will be called upon to decide. The latter phase of the subject has, consequently, not received an amount of attention commensurate with its importance. Professor Emery, however, in his lectures delivered at Yale University in the Page Lecture Series and now republished in book form, recognizes the importance of the newspapers and the weekly magazines as the principal reliance for the formation of public opinion. . He suggests the decided need of a clearing house of information on matters of public policy. The subject matter of his volume is presented in an informal and somewhat rambling manner, and contains some unfortunate blemishes of style, due in part to the lack of revision of the original lecture form. It is concerned principally with raising certain ethical questions which may confront the voter, or the legislative representative, who is torn between his allegiance to party and to principle, or is forced to choose between special interests and the general good. He warns against judgments upon such questions based upon insufficient data, and discusses their various aspects in a practical and interesting manner. The book contains much sound advice of a popular character for those who wish to inform themselves as to their political duties.

J. M. MATHEWS.

The Reconstruction of the New Colonies Under Lord Milner. By W. BASIL WORSFOLD. In two volumes. (London: Kegan Paul, Trench, Trubner and Company, 1913. Pp. vii, 376; iii, 429.)

An unbiased history of a period characterized by such strong and bitter feeling as was called forth by the war in South Africa and its settlement,

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can hardly be expected within twenty years of the actual events. There can, however, be no pretence on the part of Mr. Worsfold to impartiality in his presentation of the large share that Lord Milner had in the guidance of affairs in South Africa between the conclusion of peace at Vereenigen on May 31, 1902, and the departure of the high commissioner from Capetown in April, 1905. Mr. Worsfold's chief concern is with Lord Milner himself—the history of reconstruction in South Africa is secondary and is useful chiefly as a means of glorifying his hero. So strong is Mr. Worsfold's admiration for the statesman who represented England during this critical period, that his volumes are more than partisan. They are rather of the nature of special pleading—the case of the defendant, as set forth by his barrister before the court of public opinion. In Mr. Worsfold's eyes nothing that Lord Milner did was wrong; and also, unfortunately for the impression that the book makes upon the reader, nothing was ever right that was advocated or effected by the English Liberal party.

The constant insistence on these two lines—adulation for Lord Milner and reprobation of the English Liberal party—is irritating, and produces the contrary effect from that intended by the author. It puts the reader on the defensive and makes him continually distrustful of the case as presented. It is a pity that Mr. Worsfold has not been able to approach the subject of reconstruction in South Africa in a more judicial frame of mind, for it is an interesting story, and a story that is highly creditable to the chief actors in it, even though one may refuse to acknowledge the omniscient benevolence and ability of Lord Milner. Within a space of three years, although hampered by two bad seasons when the harvests were almost complete failures on account of droughts, through the measures taken by the British authorities, a land which had been completely devastated by a most destructive form of warfare was resettled. At a cost of over £16,000,000 sterling, some 200,000 persons—Boers and British refugees—who had been driven from their homes during the war were repatriated. Food rations, building materials to restore their homesteads, and seed and stock for their farms were brought nearly a thousand miles by rail and distributed to the burghers. A government was set up, and a mounted police force organized, and some degree of mutual confidence began to take the place of the jealousy and race hatred which had characterized the relations of the Boers and Britons of the Transvaal. The story of all this arduous work of reconstruction is told in detail, and these chapters afford perhaps the best idea yet given of the utter devastation which resulted from the guerilla warfare of the last eighteen months of the struggle in South Africa.

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The experiment of importing Chinese labor for the Rand mines is told with the utmost sympathy. It was an experiment for which Lord Milner assumed full responsibility. Mr. Chamberlain refused his sanction, and it was not carried into effect until Mr. Lyttelton had taken Mr. Chamberlain's place at the Colonial Office. As Lord Milner's champion Mr. Worsfold espouses the cause as his own. In no part of his volumes is the special pleading more manifest than in the chapters devoted to the question of labor for the gold mines, and nowhere is Mr. Worsfold less convincing. Cheap labor meant larger profits to the proprietors of the mines. It meant the working of poorer grades of reef, and consequently the expansion of the mining industry. Consequently the Rand needed cheap labor, and so long as it was not easily in sight in South Africa, the mine owners ought to be permitted to import it from China. There are no words too hard for the leaders of the Liberal party who opposed Chinese labor or for the working men of England who were deluded into opposing the importation of these indentured laborers. The continued and increased prosperity of the mines since the repatriation of all the Chinamen Mr. Worsfold passes over without much comment. Chinese labor was essential to the very existence of the mines in 1904. In 1910, all the Chinese had disappeared; but the mines are working still and profits were never greater than they have been since the end of 1910.

In writing these volumes Mr. Worsfold has had the advantage of access to official papers and documents. He has made a large use of Lord Milner's diaries—even to recording when Lord Milner had a bad night or suffered from a headache. He also quotes freely from correspondence between Lord Milner and the Ministers in England, as well as from the public speeches both of Lord Milner and later, when Mr. Chamberlain was in South Africa, as the secretary of state for the colonies. In fact it is rarely that any section of a man's public career is told so fully during his lifetime as Mr. Worsfold here tells the story of Lord Milner's administration of the newly conquered provinces of South Africa. Later when a real history of the period is written, these volumes will furnish invaluable material to the historian; but material which must be balanced by a fairer presentation of opposing opinions and of the consequences which have resulted from policies—such as the granting of responsible government to the new colonies by the Liberal government—which Mr. Worsfold through his sense of loyalty to Lord Milner, passionately opposes.

A. G. P.

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Moderne Rechtsprobleme. (Zweite, durchgearbeitete Auflage.) By JOSEF KOHLER. (Leipzig and Berlin: B. G. Teubner, 1913. Pp. vi, 98.)

The first edition dedicated to Prof. Carlo Fadda was published in 1907 and has been translated into Italian by Luigi Lordi with an introduction by Ferrara. In the present edition two new sub-titles have been added, various paragraphs have been rewritten, and the notes as revised have been placed at the end. The problems discussed are legal philosophy, criminal law, criminal procedure, company law, civil procedure, and international law.

A book of this compass, intended not primarily for the professional lawyer, but for the general lay reader, cannot be a treatise, and necessarily must rest in outline to sketch so wide a field. Reference therefore is made by the author to his *Ziele des heutigen Strafrechts* (1909), *Einführung in die Rechtswissenschaft* (1902; 4th ed. 1912), and especially to his *Lehrbuch der Rechtsphilosophie* (1909) which is soon to appear in English translation (Boston Book Company) under direction of the Association of American Law Schools. Nevertheless, the present work, even though a popular contribution, is yet valuable in adding something here and there to an understanding of what is obscure in Kohler's general position.

There are in Germany today three distinct and vigorous schools of legal philosophy, and Kohler is the unquestioned head of one of these—the Neo-Hegelian School. The labors of Savigny in the early part of the last century developed the proposition of legal relativity. Later Jhering, whom Kohler is unable to mention without passionate animosity, attained the view of social purpose in the law, but his discovery overwhelmed him, and he was unable to mark out the limits or character of his new continent. Kohler has added a new element to the thoughts of his famous predecessors—the notion of culture which unites at once the passivity of the historical view with the active standpoint of the teleological doctrine. Culture, as Kohler has here revised his definition, "is the evolution of the forces inherent in humanity, leading to the highest possible development of human knowledge and human power of creation." There is no absolute law valid for all times and all places; but yet there is a distinction between the law that is, and the law that ought to be. The middle ground between these two positions, that of natural law on one side, and positivism on the other, is taken by the concept of culture which is the standard for the law of every age and every country.

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There is a formal similarity between the legal philosophy of the Neo-Hegelians, and the legal philosophy of the second regnant German school, the Neo-Kantians, in this that both postulate a standard for legal rules. Kohler speaks of culture operating on a changing stream of historical facts; while Stammler thinks of a fixed law with a variable content. The resemblance in these two philosophical positions ceases with the verbal form of expression of their basic ideas. The essential difference appears to be one of ends and means. Kohler has in view always the end of social life—greater knowledge, and an expanding power over the external forces of nature. If the means of attaining these results do not for the age and the country interfere with the orderly evolution of human powers, Kohler would justify them; even though, from the standpoint of a later era, they would for that later age be universally condemned. Stammler stresses the means adopted by each age for its unfoldment of civilization, and theoretically he seems to be indifferent to what is accomplished so long as the procedure is strictly in accord with the rules governing each step of the way. For this reason Kohler can readily exhalt such institutions as wife capture, or slavery for primitive times, while Stammler would be obliged to say that they are contrary always and everywhere to the standards of justice.

Kohler's position is based on a foundation of universal history in which the lines of culture evolution are traced to their primitive foundations. In this field, Kohler has contributed the most generous results of any living man, and for this scholarship he has long been recognized in this country as a great authority by those writers who employ the evolutionary or comparative method in dealing with social sciences; but it has not been generally appreciated that these investigations of Kohler in universal legal history are the foundations not alone of a science of comparative law as a humanistic addition to knowledge, but that they are the groundwork of a philosophy of life, and especially a philosophy of its great central phenomenon, the law. To extend a comparison already ventured on, Kohler's legal philosophy has the great advantage, as against Stammler's, of combining both the positive and negative elements of cultural life; it seeks and promotes a definite end; it is not restricted by any formula of action. Stammler on the other hand has only a negative program; he has no concern from a legal viewpoint with ultimate ends; and he is content if legal rules fall within the rigid patterns which he has constructed. Where Kohler makes of the world-process a theatre of action for the Samurai of achievement, with an allowance for the "mad pranks" of human nature, Stammler appears to

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establish a negative heaven of pillar-saints, inaction, and confucianism in the law.

In this work, Kohler raises no quarrel with Stammler and his school who have attempted a new departure from Kant's rationalism, but his contention is chiefly with the third leading school, the school of positivism, which has already been mentioned in passing. The detail of the presentation dealing, among other things, with the concepts, time, space, and causality, lies in the domain of metaphysics, rather than the law. Of the three schools, the Neo-Hegelian is the only one with a truly fortified and completely organized metaphysical foundation; and the positivist school especially appears to be able to thrive without any contact with ontological problems or questions of ultimate reality. Kohler in his attempt to relate legal problems with philosophical ideas, does not stop with generalities or abstractions after the fashion of teachers of natural law of the last century who when descending to actual problems were quite unable to proceed otherwise than with the instruments of conventional legal technic. Philosophy of law for Kohler is not a thickly walled fortress with muzzled cannon set apart from the movement of the outside world, but it enters organically and intimately into the detail of juridical life. This is disclosed particularly in his treatment of the problems of crime to which more than half of the pages of this book are devoted. Rightly or wrongly, he defends with great vigor the so-called "classical" theory of punishment based on an analysis of fredom of will, and he combats with equal force the views which since the time of Ferri have gained what may perhaps be said to be the leading position in criminal science. Kohler however adopts many ideas which are distinctive of the newer position; but for him these measures are not measures of punishment, and have no bearing on the true philosophy of punishment which rests essentially in atonement.

In view of our own economic problems, Kohler's brief discussion of the company problem is one of the most interesting parts of his readable book. In his larger work already cited (*Philosophy of Law*) he has in effect indicted the American solution of the trust problem. Legislation which operates only by prohibitions, he believes to be ineffective; on the contrary, legislation which operates with the aid of human nature will produce the most satisfactory results. Company organization is comparable to the organization of States. Kohler has already spoken in terms of the highest admiration of the discovery of our system of federal and state government (an invention, by the way, which he attributes to Peletiah Webster); and he thinks that this same form in company organ-

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ization will furnish the means whereby neither the advantages of individual nor organized effort, both of which are culturally necessary, will be lost; and whereby each may retain its autonomy and elasticity within a definite sphere, and supplement and aid the other.

It needs hardly be stated that a German book which contains a table of contents does not require an index—at least not in Germany.

ALBERT KOCOUREK.

Le Président de la République, Son Rôle, Ses Droits, Ses Devoirs. By HENRY LEYRET. (Paris: Armand Colin, 1913. Pp. xvi, 282.)

The author of this little book is one of the best known political writers of France. His *La République et les Politiciens* (1909), *La Tyrannie des Politiciens*, (1910) and *Les Tyrans Ridicules* (1910) contain some of the most acute and suggestive criticisms of French political institutions and customs that we have. In his latest book, he has examined the presidential office in the light of forty years experience, and has attempted to give a picture of the actual rôle which the President plays in the political life of the Republic. As one reads his story one cannot avoid the conviction that the French presidency is, as the Radicals and Socialists have long claimed, pretty nearly a useless institution. M. Leyret shows from the testimony of both the Republicans and the Monarchists of the national assembly that the authors of the constitution intended to create, and believed they were creating, a great office, the incumbent of which would, if anything, be a more powerful magistrate than the President of the United States. But it has turned out quite otherwise. The reason for it lies in the fact that the authors of the constitution, after having conferred upon the President a large group of important powers, proceeded to reduce his rôle to a nullity by putting him under the guardianship of ministers and declaring him to be irresponsible. The consequence was that in their desire to prevent the President from doing what he ought not to do, they made it impossible for him to exercise the power which they gave him, and he no longer attempts to do so. No president since MacMahon has exercised the right of dissolution, the right of suspensive veto is a dead letter, and no executive messages except letters of resignation and letters of thanks for his election have ever been communicated to either chamber. A president who should attempt to exercise the powers which the constitution gives him would be denounced as a dictator and his resignation would probably be demanded by the chambers. Another cause of the enfeeblement of the presidency is no doubt to be found in

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the character of the men who have held the office. Presidents like Grévy, Loubet and Fallières have voluntarily effaced themselves and allowed parliament to govern the country. Occasionally, presidents like Casimir-Perier have entered office with a somewhat exalted conception of their obligations and responsibilities, but their efforts to play a real rôle in the government of the country have signally failed, and some of them have resigned in disgust. Casimir Perier resigned because he was unwilling to play the rôle of valet to the parliament; Grévy was forced to resign because of a family scandal. Thiers and MacMahon were practically forced to retire because of the hostility of parliament. These precedents have clearly established the principle that although the term of the president is fixed by the constitution, he holds in fact at the will of parliament, in short, that the office is a mere dependency of the legislature, which insists on exercising itself the real governing authority.

Many thinking Frenchmen regret that the presidential office has been reduced to such insignificant proportions and they would like to see the chief of state play a rôle like that played by the American executive, and among these Mr. Leyret is one, but not even a strong man like Poincaré can raise the office above its present level unless the whole attitude of the parliament toward the presidency is changed. So long as it insists on governing as well as legislating, the President must remain as he has long been, a mere master of ceremonies, a "chaser of rabbits," an *ombre décharnée d'un roi fainéant.*

JAMES W. GARNER.

The Political Philosophy of Burke. By JOHN MACCUNN. (New York: Longmans Green and Company; London: Edward Arnold, 1913. Pp. 272.)

This book represents the second attempt in recent years to reduce Burke's political philosophy to a system and to put it into coherent form so as to enable one to form an estimate of his theories as a whole. Graham's essay on Burke in his *English Political Philosophy* (third edition, 1911) is less systematic in its method of treatment than the book under review, though in some ways it is a more brilliant and informing analysis of the theories of the great Whig orator. Graham analyzed in chronological order each of Burke's more important political speeches, pamphlets and essays, described their setting and criticised somewhat severely his ultra conservative and reactionary doctrines. MacCunn follows a different method and adopts a somewhat eulogistic attitude

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toward the teachings of his master. He arranges Burke's theories according to topics and introduces more system into his method of treatment.

It is not an easy task to summarize Burke's political ideas, because with the exception of his *Reflections on the French Revolution*, he never wrote a systematic treatise. His political theories are found in pamphlets, speeches and letters scattered through a long series of years; the views which he set forth in some of them are not always easy to reconcile with those expressed in others, and his attitude is more often that of a polemist than a philosopher. Indeed, Burke never claimed to be a political philosopher in the ordinary sense of the term; he was first of all a statesman and a political orator, and he had a profound contempt for theories and for theorists, yet, as Mr. MacCunn remarks, he was in a sense one of the greatest of philosophers. He had studied Aristotle, Locke and Montesquieu, not to mention lesser political writers, and in every speech, pamphlet or treatise which he gave to the world, we find abundant proof of his wide range of reading, and not the least in history and politics. He thought profoundly on many political questions and he clothed his ideas in language characterized by a style and literary charm rarely equalled. No man ever discussed politics with so much eloquence and penetration or went so deeply to the root of the matter with which he dealt. He rarely discussed a bill or an administrative measure, however trivial, in which he did not go back to first principles, raise it above the level of ordinary questions and lift it into the realm of great ideas. Consequently, notwithstanding his denunciation of theorists, he was himself a philosopher, although, to be sure, "a philosopher in action" rather than a "refining speculatist" of the kind he distrusted. A study of his writings shows that the theorists against whom his polemics were chiefly directed were the abstract philosophers of France, those "architects of ruin" who had "laid the axe on the root of property" and who justified their acts by a "sort of digest of anarchy called the rights of man." He admitted that theories and philosophies have their use for he once said, "I do not vilify theory and speculation, no, because that would be to vilify reason itself." With the French philosophy that attributed the foundation of society to compact, that regarded the state as a mere partnership, that taught the doctrine that men surrender certain of their rights upon entering civil society, he had no patience, and it was the subject of some of his most bitter denunciations. His hostility to constitutional reform, his repudiation of the doctrine of the sovereignty of the people, his attack upon the principle of majority rule, his defense of aristocracy and of established

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churches, his hatred of direct democracy, his plea for the independence of the representative as over against his constituency, and his theory of the Whig trusteeship, sum up the political theories with which Burke's name is most closely associated. Reactionary in his sympathies, entertaining an almost superstitious reverence for the past, believing that the constitution was an "entailed inheritance" upon which the people had no right to lay their hands, and with no faith in the possibility of political progress, his ideal was in the past rather than in the future.

Mr. MacCunn's analysis of Burke's philosophy is marked, as I have said, by a coldly judicial attitude. Unlike Graham, he rarely criticises and sometimes apologizes and defends. Burke's chief fault he finds to have been in his lack of an ideal. He was a political genius of the first order, and no one had it in him to give his country such a comprehensive and satisfying political ideal, but here he failed. The reader cannot but wonder, says MacCunn "how much of the strife and bitterness of the nineteenth century might have been averted if this master in politics had given the reins to his imagination as freely and sympathetically in looking forward as in looking backwards to ancestors, but it was not in that path that he was to work."

JAMES W. GARNER.

How France is Governed. By RAYMOND POINCARÉ. Translated by Bernard Miall. (New York: McBride, Nast and Company, 1914. Pp. 376.)

It is a difficult task for a man active in political life to describe the milieu in which he lives, moves and has his being. Such a man is apt to take for granted a degree of knowledge on the part of his readers which they do not possess, or to say things which are of interest to himself alone. But the president of the French Republic has avoided these difficulties in his new book, which is an admirable account of the essential features of the French government and well-proportioned to the needs of the average intelligent reader. M. Poincaré's literary gifts have stood him in good stead, as clarity of thought and felicity of expression are apparent on every page. His point of view—whenever he betrays one—is that of an old-fashioned Liberal. But so well flavored with French lucidity is his Liberalism that at times it appears almost like Radicalism.

The introductory chapter consists of a short discussion on civic rights and duties; then follow chapters on the commune, department, state,

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national, sovereignty, constitution, president, ministers, chambers, public education, justice, taxation and military service. A historical survey prefaces each chapter which, though crisp and brief, is exceedingly illuminating. The chapter on the president is written in a spirit of studied detachment, hence it adds nothing to our knowledge of the subject. M. Poincaré is anxious to acquit France of the charge of revolution and to show the continuity of the French state. "France," he writes, "has known kings, directors, consuls, emperors and presidents of the Republic. By all these metamorphoses she has remained France, and the life of the state has been neither suspended nor impaired. Had he used the word "bureaucracy" instead of "state" this statement might go unchallenged. The function of the French bureaucracy as an absorber of the shocks of revolution has been strangely overlooked by most historians who delight in picturing France as always breaking with the past.

When, in the concluding chapter, our author comes to write of the army, the scholarly reserve which he has maintained throughout the book breaks down. He is eloquent in the praise of patriotism in general and of French patriotism in particular. He is frankly for a vigorous military policy, as "France has need of a strong army to defend her independence and her honor against the attacks, always possible, of other nations." Evidently the time has not yet come when a Frenchman, even though he be a philosopher, can think of 1870 without emotion.

J. SALWYN SCHAPIRO.

Jahrbuch des Völkerrechts. By TH. NIEMEYER and K. STRUPP, 1. Band. (München and Leipzig: Duncker u. Humblot, 1913. Pp. viii, 1556.)

The first volume of the *Jahrbuch des Völkerrechts*, edited by Professor Niemeyer of Kiel and Dr. Strupp of Frankfort with the coöperation of the late Dr. Asser, Professor Ariga, the late Professor von Bar, Professor Fiore and others, is a book of more than 1500 pages, a number about twice that announced in the early prospectus. This volume is the first of a series of annual issues. For various reasons, it appeared somewhat late in 1913, though covering the year, September 1, 1911, to August 31, 1912. Subsequent volumes will probably appear more promptly.

This book is among those which are essential not merely for specialists and students, but for others interested in or concerned with matters of international law and international politics.

The book is divided into five parts: (1) Documents, (2) Articles and reports, (3) Action upon treaties, (4) Miscellaneous, (5) Bibliography.

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There follows an appendix showing changes in the diplomatic service and an index.

The documentary material is large in amount and very valuable, particularly relating to the controversies centering about Morocco, the Turco–Italian war, Persia, Spitzbergen, Turco–Persian boundary, British-Portuguese boundary and the Panama Canal. The documentary part also contains the treaties and conventions concluded during the period 1911–1912, important bills, laws and declarations having international bearing, such as the British naval prize bill, Italian law in regard to coast waters, and the declaration in regard to the delimitation of frontiers in equatorial Africa. The recent awards of the court of arbitration at the Hague are also given.

The second part contains articles upon many of the subjects illustrated by documents of the first part. Dr. van Beek en Donk shows that the progress of arbitration was not rapid in the year 1911–1912, if viewed solely from the number of treaties concluded. Discussion has, however, shown the difficulties to be met both as regards the bringing of cases to the court at the Hague and the execution of its awards.

The Panama Canal question is discussed by Geo. C. Butte and by Thos. Baty. Mr. Butte's article has since been published in English as "Great Britain and the Panama Canal." These articles present a comprehensive view of the arguments.

H. Wittmaack gives an account of the German law of December 24, 1911 relating to ship tolls.

The questions arising from the Turco-Italian war are very fully presented by Sir Thomas Barclay, Dr. Rapisardi-Mirabelli, Professor Fiore, Dr. Tambaro, Dr. Baty, Professor Perret, Professor Kebedgy, and Professor Scelle. The attitude of these writers varies from that of presenting the position of Italy as illegal and unjustifiable to that of a warm advocacy of the action of Italy. The claim that Italy was acting in accord with "manifest destiny" receives support. The less general topics, such as the legal status of Italians in Turkey under the "capitulations," the status and future of the Aegean Islands, the position of Egypt endeavoring to maintain a quasi neutrality between Turkey upon which it is nominally dependent and Italy with which Turkey is at war, and the closing of the Dardanelles, are fully treated, and in some instances illustrative documents accompany the articles.

Professor Basdevant's article considers the Morocco question from the point of view of international politics, particularly as affecting European alliances and France, while Professor Niemeyer looks more to the

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international law and policy of the events of 1911 and 1912 at Agadir, the territorial compensation in central Africa and the German program.

Mr. Wang endeavors to show by argument and documents that through the revolution, China has developed a government in fact and in law.

Mr. Bentwich describes the changes in Persia including the Shuster incident, and he also discusses the proposed British naval prize bill and the declaration of London.

The late Professor von Bar gives a résumé of the work of the Institute of International Law at its meeting at Christiana in 1912.

The reports from the various states give an excellent summary of the course of events which have had international significance as well as interpretations and explanations of laws, decrees, conventions, and treaties which are of international importance. The list of writers upon affairs in each state shows the care which has been taken to secure reliable accounts: Germany, v. König; Austria-Hungary, v. Dungern; Switzerland, Huber; England, Bentwich; France, Basdevant; Russia, v. Korff; United States, Reinsch; Central and South America, Sa Vianna; etc.

The presentation of the work of the international conferences of the year covers about sixty closely printed pages. These conferences touch upon negotiable instruments, Spitzbergen islands, opium, sanitation, sugar, radio-telegraph, water rights and Pan American movements.

The various societies and organizations devoted to the study of international law and relations are described by those familiar with their work.

Part III is devoted to the presentation of the course of action upon treaties and other international compacts.

Part IV contains much valuable information not ordinarily available in any one book. Mention is made of the proposed school of international law at The Hague, the American Institute of International Law, the Carnegie Endowment for International Peace, etc.

In Part V, there is an extended bibliography topically arranged with a particularly full enumeration of the titles relating to peace.

There is an appendix showing the changes during the year in the diplomatic and consular service of various states.

The index is well adapted for a reference book.

Occasional misprints and errors may be found, but considering the fact that the material in the book is set up in different languages, principally German, French, and English, the errors are remarkably few.

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There is so much valuable material in the fifteen hundred pages that it is difficult to make selection. A complete review would require long discussion of some of the matters presented by those who have labored in the production of the Jahrbuch des Völkerrechts. It is safe to assign this volume a leading place among the year-books and Drs. Niemeyer and Strupp are to be congratulated upon the excellent beginning and high standard which is shown in the issue of the *Jahrbuch* for 1911–1912.

G. G. WILSON.

The Judiciary and the People. By FREDERICK N. JUDSON. (New Haven: Yale University Press, 1913. Pp. 270.)

In the William L. Storrs' lectures for 1913 before the law school of Yale University Mr. Judson discusses briefly the development of judicial power, the relation of judicial to legislative power, the recall of decisions and of judges, and the reform of judicial procedure. Perhaps the greater part of his discussion is directed to the judicial power over legislation and to the need for independent courts. The discussion is somewhat discursive, and is too brief to present in detail the justification for the author's various statements.

In several of the lectures Mr. Judson discusses the recent discontent with judicial power over legislation, and deprecates this attitude without attempting to explain its basis. He feels that much of the difficulty is due to the increasing incompetence of legislatures, although there is a good deal of basis for the statement that their competence has been increasing rather than decreasing. In agreement with a number of other defenders of the courts he says that judicial action but enforces limitations which the people have placed upon themselves in order to restrain impulsive and inconsiderate action (pp. 172–185). This ignores the fundamental criticism resting upon the contention that the courts have by interpretation enlarged the "due process of law" clause, and are therefore enforcing limitations which they, not the people, have read into the constitutions. Such a criticism cannot be ignored, and is apparently justified by the fact that we can find the same court in the course of a forty-year period changing several times its concept as to what legislation is or is not "due process."

In his argument for independent courts Mr. Judson nowhere calls attention to the great difficulty of having free from political control courts whose decisions upon constitutional matters necessarily deal with questions of political and social importance. Whenever questions of a political character are being presented to a court for decision, then

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necessarily political issues will enter into the judicial field. It must be recognized as one of the defects of our system of judicial control that where issues of policy are presented to the court and a decision given contrary to the sentiment of the community, such questions must be settled finally in the political field; and the sentiments of the community will in such cases finally prevail over judicial action. Such a conflict has recently been going on as to the subject of social legislation, and the public sentiment is gradually prevailing, in most cases without the need of constitutional changes. The political aspect of judicial functions in this country, entirely ignored by Mr. Judson, is overemphasized in Brooks Adams' recent book on the *Theory of Social Revolutions*.

In spite of this fundamental criticism it should be said that the book under review is distinctly worth reading as a conservative and effective presentation of the need for judicial independence and for constructive reforms in procedure by the courts themselves. The chapter on judicial procedure is perhaps the best in the book, and deserves a wide circulation.

The book was not well proof-read. For example, Carroll appears in all cases in place of Collins as the author of a recent work on *The Fourteenth Amendment and the States*.

W. F. Dodd.

The Philippine Problem. By Frederick Chamberlin. (Boston: Little, Brown and Company, 1913. Pp. vii, 240.)

Mr. Chamberlain writes in a spirit of approval of American methods and of admiration for the results of the American administration, but he is an honest critic and points out serious blemishes upon the American records in the Philippines. His treatment of the subject of cost is unusually candid in one writing from his point of view. He contradicts the statement that the Philippines are now self-supporting, and he makes an analysis from which he concludes that it has cost the people of the United States about $10,000,000 a year to govern the Philippines during the last decade. Taking in the cost of suppressing the insurrection, the total cost of the islands to the United States up to June 30, 1912, was $287,000,000.

Mr. Chamberlain thinks we may anticipate fresh revolts against American rule. He says: "It seems folly to believe that these extremely bright, intelligent, ambitious, proud, *gente illustrada* are going to sit by calmly still until we tell them they can run their government. . . . . If they rebel, we shall, of course, reconquer them, and then very likely take

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their uprising as another evidence of their inability to set up a stable government, with the result that we shall have a fresh reason why independence should be withheld from them for another century or so."

It is not a cheerful outlook, but apparently Mr. Chamberlain does not see any alternative. He thinks the people are unfit to govern themselves, and that we shall have to keep on the job as best we may.

H. J. FORD.

Das religioese Recht und dessen characterisierung als Rechts Theologie. By DR. MORDCHE W. RAPAPORT. (Berlin und Leipzig: 1913. Pp. ix, 79.)

The purpose of the writer of this closely reasoned, well-knit essay is to set forth the distinctiveness of religious jurisprudence contained in the Bible and developed in the Talmud and the canon law in Christianity, as contrasted with the conception of jurisprudence in the modern state. The religious laws as expressed in the Bible and other religious codes find their authority in the command of God; the civil law finds this in the development of human institutions. The former has therefore absolute warrant, the latter only relative. The religious or divine element is supreme in the one, the human in the other. But the one is law as well as the other although this is denied by some well known writers on the development of law notably Jhering and his school; while such grant that in the Bible there are enactments which satisfy all requirements of law yet they deny these enactments the character of law since they have not arisen from pure jurisprudence but from religion; therefore they claim that investigation into the law of the peoples of the Orient which basing as it does for the most part on religion has no value for jurisprudence. It is this thesis which our author takes particular pain to combat. He aims to vindicate for religious legislation the name and title of law even though it have not the same characteristics as has law in the modern connotation of the term. Still there is a wide difference between the two; modern jurisprudence insists that it is concerned only with the regulation of human affairs and neither takes note of nor acknowledges the relation of God to man while religious legislation is regulated altogether by the divine tradition. Hence the state, the legal institution as entirely distinct from the church, the religious institution, is a necessity for modern jurisprudence. The Orientals who fathered religious jurisprudence know no such doctrine as this of the separation of church and state. Modern jurisprudence accepts purely

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human guidance in the institutions of society culminating in the modern state; religious jurisprudence on the other hand posits the ipse dixit of religion or the church as its rule and measure. God is the law giver; no laws of his can be repealed; they are eternal. The judge is simply the mouthpiece of God.

The essay proceeds throughout along this line. The author has a fine grasp of his subject and reasons very clearly. An interesting and rather startling statement is his claim that the ancient Jewish state was not a theocracy. The proof for this statement (page 40) is not convincing. With this exception his points are well taken and his argument well defended. He proves effectually his thesis that so called religious or theological jurisprudence is entitled to be termed law. He establishes by cogent argumentation his claim that law from the social standpoint is an integral element of the monotheistic belief; God is the source of right; hence all crime and wrongdoing are subversive of the will of God. This is the absolute religious standpoint as over against the human and relative as elucidated in modern theories. It is only another expression of the age old conflict between idealism and realism. Dr. Rapaport's essay is a thoughtful contribution to the elucidation of this conflict as it affects the subject in hand.

DAVID PHILIPSON.

Jahrbuch des oeffentlichen Rechts. Band VII, 1913. (Tübingen: Verlag von J. C. B. Mohr (Paul Siebeck), 1913. Pp. 507.)

As usual, the *Jahrbuch* for 1913 is divided into two parts, the first containing a number of essays on various questions in the general field of public law, the second devoted to reports of recent legislation and other developments in the public law of the German Empire, the several German states and foreign countries. This second part of the volume contains a large amount of interesting and valuable material for the student of comparative constitutional law and comparative legislation. The constitutions of the Portuguese and Chinese republics are given in German translations. By far the larger portion of the *Jahrbuch* is given over to these reports; only 121 pages being occupied with the *Abhandlungen.*

The first article in Part I, by Dr. Karl Kormann, privatdocent in the University of Berlin, is on "The Relations between Justice and Administration." The writer is not content merely to define the boundary line between these two spheres of state action but discusses their relations one to the other under several categories. His discussion defends the

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thesis that both justice and administration are in fact purely formal concepts; that in effect justice is what the civil and criminal courts do, administration what the administrative officials do, without reference in either case to the content of their acts. The various criteria which have been proposed for determining by some material principle the field of each and the dividing line between the two fields are discussed and discarded as inadequate. A large number of questions concerning both can only be answered by reference to the general principles of public law, which are applicable in the one field as in the other. Questions concerning legal competence of an individual, concerning the extent to which error, fraud or duress invalidate a legal act are examples of the numerous identical questions which arise in both fields and may be answered in both by reference to general principles of public law. These are what the writer calls relationships of identity. A second category is that of relations of subordination—opposed certainly to the logic of the doctrine of the separation of powers but nevertheless existent. That the administration is subordinated in many respects to the courts requires no elucidation. A corresponding subordination of courts to the administration obtains only in a minor degree through the supervision exercised by ministries of justice. A third category of relations between the two branches of government is that of mutual and reciprocal support. Courts require the assistance of administrative officials, administrative officials of courts, in order effectually to perform their respective functions. Finally a fourth group of relations is that of reciprocal control. Each department is bound in certain respects by the acts of the other.

The second essay, entitled "Preliminary Questions of International Law," is written by the well-known authority on the work of the Hague Conferences, Prof. Otfried Nippold of the University of Bern. Should the publicistic science of international law confine itself merely to the recording and interpreting of the developments which are taking place, particularly through the Hague Conferences, or should it actively and constructively participate in this development? Should it propose questions for discussion at the next Hague Conference and point the way to the solution of the problems which engage the attention of ministries of foreign affairs? These are some of the questions discussed. The writer takes a moderate view. The primary function of the science of international law is doubtless still that of registering changes and interpreting them; but it is quite within its province, and indeed incumbent upon it, to assist in the development of international law also. In this connection the writer defines his position with regard to the great

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pacifist movement of recent years. He believes that this movement has greatly aided in the actual development of international law. It has been a potent constructive agency in this field. But because of its essentially propagandist character any overt alliance between it and the science of international law ought to be avoided. Moreover, in one respect the writer believes that the pacifist movement is misdirected and liable to thwart and delay real progress. The ideal of a world state, which the pacifists elevate as the goal of all their efforts, is fatuous. Not an elaboration of international political organization, but a development of international law is what is needed. The national state, which is now the unit in a family of nations will not be superseded by any world state.

The third paper is by Prof. Hans von Frisch of the University of Czernowitz on the subject of "The Law of Austrian Citizenship." Springing in first instance from the civil code of 1811 but supplemented by a long line of special ordinances, decrees and patents, and hitherto lacking comprehensive codification, the law of Austrian citizenship is a conglomerate composed of the most diverse norms having their sources in the numerous different forms of government of the last century. The courts and administrative officials have been either unable through their interpretations to introduce any clear solution of existing problems, or the solution reached is inconsistent with the practice of other nations and the theory which should govern the subject. Only a codification will avail to remove the difficulties which attend this subject.

The fourth article, by Dr. Leo Wittmayer of the University of Vienna, is on "The Significance and the Development of the 'Secondary' Legislation in France." The extensive ordinance-issuing power of the French president is what is meant by "secondary legislation." The history of these *règlements d'administration publique* is traced from the revolutionary period. The circumstances under which they may be issued; the method of their enactment, and particularly the rôle which the council of state plays in connection with them; their importance as being materially laws; their significance as constituting exceptions to the principle of the separation of powers; the limitations on their validity, all are phases of the subject fully discussed.

The last article in the first part of the *Jahrbuch* deals with "North American Court Decisions Concerning the Question Whether Foreign States are Subject to the Local Jurisdiction." The author is H. Wittmaack of Leipzig. The leading case of the *Exchange*, decided by Chief Justice Marshall in 1812, is reported at length. The familiar case of the *Variag* (1902) is likewise discussed. Finally the writer reviews the re-

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cent decision of the supreme court of Massachusetts in which it was held that certain trustees of the Canadian Intercolonial Railway, in whose hands were placed property of the railway located in Massachusetts, could not be sued since the railway was technically the property of the king of England.

Altogether the *Jahrbuch* maintains in this volume the high standard of excellence for which it is reputed. One wonders why a similar publication in English would not be feasible.

WALTER JAMES SHEPARD.

Die Monroedoktrin in ihren Beziehungen zur amerikanischen Diplomatie und zur Völkerrecht. By DR. JUR. HERBERT KRAUS. (Berlin: J. Guttentag, 1913. Pp. 480.)

It has remained for a German to write the fullest and most systematic treatment of the Monroe Doctrine. There is no book in the English upon this subject which approaches Dr. Kraus's work in completeness or in orderly arrangement. The materials, both source and secondary, have been carefully examined (there seem to be surprisingly few omissions in the excellent bibliography) with a resulting freshness of treatment which an American writer, handicapped by the hackneyed traditions of the subject, might have found difficult to obtain. As one might expect, the work is fully documented and aside from the usual but quite unnecessarily careless proofreading, the extracts from documents in English are faithfully reproduced. An appendix contains the presidential messages having a bearing upon the subject.

The author, whose academic and other connections in the United States were numerous, was led to an investigation of the Monroe Doctrine in considering two problems: the causes of the successful and rapid increase of the political power of the United States, and the essentially different position which this country occupies from all other world-powers. Both questions, we are informed, led him to examine the Monroe Doctrine! While his main interest was the international legal bearing of the doctrine, its historical development fills the greater portion of the book. Dr. Kraus first considers the message of 1823, its authorship, content, and historical setting. This part of the subject has been treated so often that nothing novel in interpretation may be expected. The message was the expression of the fundamental principle of the political isolation of the Americas. This rested upon four antecedent propositions: the doctrines of no-entangling-aliances, neutrality, recog-

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nition of *de facto* states and governments, and the "Madison Doctrine" of 1811. The second part traces the development and enlargement of the Doctrine from 1823 to 1912. The various "enunciations" Dr. Kraus arranges under two heads as subsidiary, or resulting, principles, (a) that of the limitation of the freedom of political action on the part of non-American states in America, and (b), the limitation of the freedom of political action on the part of the United States as to European affairs.

"Das erste Unterprinzip der Monroedoktrin ist ein von den Vereinigten Staaten augehendes und ihnen gegenüber bestehendes, unter Androhung gewaltsamer Durchsetzung im Falle seiner Nichtbeachtung erlassenes Verbot an die nichtamerikanische Staatenwelt" (p. 505).

As to the second, however, "Man kommt zu dem Schulsse, dass das zweite, die Vereinigten Staaten beschränkende Unterprinzip der Monroedoktrin sich erledigt habe" (p. 345).

In its present form the Monroe Doctrine is not merely a principle for the preservation of the status quo of the United States, but a policy for the continued development of the welfare and supremacy of the United States in the New World. In reaching these conclusions each incident is carefully analyzed and fitted into its proper place. The shortcomings of the treatment are the result of dependence upon official sources. One finds little as to the effect of the development of the Doctrine upon the attitude of Latin America towards the United States, and nothing whatever about the changes of popular sentiment in the United States and their effects upon our Latin-American policy.

Notwithstanding the alleged recognition of the Monroe Doctrine at the Hague Peace Conferences, and by Great Britain in 1903, the author denies that it has ever been recognized by any state as a part of international law. Its recognition has been as a policy, not as in any sense law, even as a part of the so-called "American" international law. Intervention resulting from the Monroe Doctrine solely on the basis of the right of self-defense is still possible, but not probable, though it has a basis of legal justification. Intervention for the purpose of sustaining a political equilibrium in America is more likely but it would lack legal basis. But it is in connection with international delinquencies (Völkerrechtsdelikte) that recent interventions by the United States have taken place, a development of the Monroe Doctrine which if persisted in means the political primacy of the United States and the denial of the political equality of the Latin-American republics.

J. S. Reeves.

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The Monroe Doctrine: An Obsolete Shibboleth. By HIRAM BINGHAM. (New Haven: Yale University Press. 1913. Pp. viii, 154.)

Professor Bingham's attack on the Monroe Doctrine has attracted wide attention because of his familiarity with South America and the opportunities which he has had for making the acquaintance of public men in various Latin-American countries and discussing with them the policy of the United States. This volume, which is an expansion of an earlier magazine article, is very far from being judicial in tone. In fact, the writer seems to have a personal grievance against the historic policy of the United States, and he plays the rôle of and adopts all the devices of a special advocate. After quoting President Monroe's message of 1823, he proceeds to discuss certain of its applications, and devotes a number of pages to a very severe criticism of President Cleveland's Venezuelan policy and of Mr. Olney's famous despatch. He then cites a number of incidents designed apparently to show that under the guise of the Monroe Doctrine the United States has been guilty of flagrant injustice in its dealings with Latin America and has developed a policy of unwarranted aggression. Many of the incidents which he cites, notably the Barrundia incident and the *Itata* case, are presented in a wholly misleading way.

The writer then proceeds to describe the prosperity and greatness of the most important parts of Latin Ameria—Brazil, Argentina, and Chile. He dwells at length on the enormous exports of agricultural and pastoral products from Argentina during the last few years, showing that in these products she has far outstripped the United States. He claims that these countries have advanced to such a degree of political strength and commercial prosperity that they no longer need and will not continue to submit to the overweening patronage of the United States.

The following extract shows to what absurdities this argument carries. him: "Buenos Aires, the capital of Argentina, with a population of but 1,300,000, has 3000 taxicabs; or more than New York and Chicago combined. Do you believe she would have any less if we did away with the Monroe Doctrine?" Having shown, then, the injustice and the impertinence of our continued adherence to the Monroe Doctrine so far as these countries are concerned, he proceeds to warn the United States of what may be expected. "The result of our present attitude," he says, "is that the leading powers of South America are already on

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the road toward what is known as the 'A, B, C,' a kind of triple alliance between Argentina, Brazil and Chile, with the definite object of opposing the encroachments of the United States." He then gives the number of first-class dreadnaughts now in commission or in process of construction by these three powers.

As a substitute for the Monroe Doctrine, Professor Bingham would have us cultivate friendship with our neighbors to the south and form an alliance with the "A, B, C," powers if possible. He thinks it very doubtful, however, whether these powers would be willing to receive us as an ally. His substitution for the Monroe Doctrine, therefore, is, to quote his own words, as follows: "The very next time any awkward situations arise in one of the less firmly established republics, let us at once call a family gathering and see what, if anything, needs to be done." This sounds like a return to the days of the Holy Alliance in Europe, when Austria was commissioned by the powers to put down insurrections in Italy and France was commissioned to put down the constitutional movement in Spain. Professor Bingham fails to realize that conditions in America are quite different from what they were in Europe in the days of the Holy Alliance and from what they are in Europe today. The time has not yet come when the States of North and South America can be called upon to take wise and intelligent action in family conference. A few years ago Mexico would have been classed with the more stable states of Latin America, and yet see the condition of things there today. The United States has always had to undertake many things alone on this continent which in Europe would require concerted action.

JOHN H. LATANÉ.

Consular Treaty Rights and Comments on the "Most Favored Nation" Clause. By ERNEST LUDWIG, I. and R. Consul for Austria-Hungary, Cleveland, Ohio. (Akron, Ohio: The New Werner Company. 1913. Pp. 239.)

This book is badly arranged, burdened with unnecessary repetitions, and not clearly written. Nevertheless it is not without some value. The author makes an examination of the powers of foreign counsuls in the United States in connection with the probate jurisdiction of state courts. The opinion in Rocca vs. Thompson (223 U. S. 317) is contrasted with earlier state decisions and, relying upon a dictum of Mr. Justice Day in that case, the author holds that the United States

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Supreme Court has taken a new position in support of consular treaty rights in connection with the administration of the estates of alien decedents. Such rights depending largely upon the most-favored-nation clause, a portion of the work is devoted to a criticism of the traditional American attitude towards it. The author brings together several instances where the United States has sought to gain benefits under the clause in accordance with European construction and adds decisions of state courts apparently similar. The important collection of *Consular Cases and Opinions* by Professor Stowell seems not to have been used in the preparation of the work.

J. S. R.

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UNITED STATES[1]

Agricultural Coöperation and Rural Credit in Europe. Information and evidence secured by the American Commission. Pts. 1 and 2. 916, 79 p. 4°. *Congress. Senate.* (S. doc. 214, pts. 1 and 2.)

Pt. 2, bibliography.

Agricultural Credit. Report of the United States Commission to investigate . . . . coöperative land mortgage banks, etc. Pt. III. 32 p. 8°. *Congress. Senate.* (S. doc. 380, pt. 3.)

Alaska. Coal-leasing bill. Hearing before the Committee on Public Lands, House of Representatives, 63d Cong., 2d Sess., on H. R. 13137. Pts. 1 and 2. 267 p. (continuous paging). 8°. *House. Committee on Public Lands.*

American Seamen, Welfare of. Memorial of the Seamen of the United States . . . . praying for the enactment of S. 136. 22 p. 8°. *Congress. Senate.* (S. doc. 452.)

Canal Treaties. Collection of executive documents presented to the United States Senate, relative to the Panama Canal. 84 p. 8°. *Congress. Senate.* (S. doc. 456.)

Conditions in the Coal Mines of Colorado. Hearing before the Committee on Mines and Mining, House of Representatives, 63d Cong., 2d Sess. Pts. 1 and 2. 776 p. (continuous paging). 8°. *House. Committee on Mines and Mining.*

Conditions in the Copper Mines of Michigan. Hearing before a Subcommittee of the Committee on Mines and Mining, House of Representatives, 63d Cong., 2d Sess. Pts. 1 to 4. 1619 p. (continuous paging). 8°. *House. Committee on Mines and Mining.*

Charges against Rufus H. Thayer (Judge for U. S. Court for China at Shanghai). Hearing before the Committee on Expenditures in the Department of Justice, House of Representatives, 63d Cong., 1st Sess. (including exhibits). 265 p. 8°. *House. Committee on Expenditures in the Department of Justice.*

Federal Anti-Trust Law with Amendments. List of cases instituted by the United States and citations of cases decided thereunder or relating thereto. January 1, 1914. 71 p. 8°.

Federal Control of Commerce and Corporations, List of references on. Special aspects and applications. *Library of Congress.* 104 p. 4°. Price, 15 cents.

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[1] All numbered documents and reports refer to the 63d Congress unless otherwise specified.

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